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RICHARD J. DALEY, Mayor and Local Liquor Control Commissioner of the City of Chicago, Plaintiff-Appellant,	)	APPEAL FROM THE
vs.	)	CIRCUIT COURT OF
ROBERT JOHNSON, Licensee, and the License Appeal Commission of the City of Chicago, A. L. CRONIN, Chairman, Defendants-Appellees.	)	COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This was a proceeding under the Administrative Review Act to review the findings and order of the defendant License Appeal Commission of the City of Chicago which reversed the findings and order of the plaintiff Local Liquor Control Commissioner of the City of Chicago revoking the liquor license of defendant Robert Johnson on the grounds of having permitted the solicitation for and having steered a person for the purposes of prostitution on the licensed premises. The circuit court affirmed the order of the License Appeal Commission and reversed the order of the Local Liquor Control Commissioner, and plaintiff appeals.

Police Officer David Ferguson testified that shortly after midnight on March 11, 1966, he entered the licensed premises in question, a tavern and package goods store owned and operated by defendant Johnson located in the 1000 block of North Wells Street in Chicago. Ferguson was alone and was dressed in civilian attire. At this time he was assigned to vice control.

Ferguson seated himself at the bar and ordered a drink. He testified that as the drink was being poured, he commented to the bartender, later identified as Jacob Harris, that there were no females in the tavern, that he was looking for one for the night and that it appeared that none was available. Harris told Ferguson that the girls would probably be back later and left to

wait on another customer.

Upon Harris' return, Ferguson stated that he was going to look for a woman elsewhere. Harris thereupon directed Ferguson's attention toward a woman seated at the front of the bar, stating, "There is a girl who will take care of your business." Ferguson told Harris to take a drink to her and to see if she was "busy." When Harris returned he told Ferguson that she would "take care of your business." Ferguson then asked Harris if $10 was too much to pay her and Harris stated $10 was too much to pay the women "around here" and advised Ferguson to start "bargaining lower."

Ferguson joined the girl, later identified as Zora Gill, and the pair agreed to engage in an act of sexual intercourse and an act of deviate sexual behavior for $7. Ferguson thereupon returned to his original seat, informed Harris that they had struck a bargain, and asked Harris if there was any danger of being "rolled" by Miss Gill, to which Harris replied, "No, she wouldn't do anything like that. She is in and out of here all the time and she wouldn't be allowed in here if she was doing that sort of thing." Harris said he would speak to the girl to insure that Ferguson would not be hurt, which he did.

Officer Ferguson and Miss Gill left the tavern and proceeded to a hotel across the street where they registered and entered a room paid for by Ferguson. Ferguson gave Miss Gill the sum of money previously agreed upon, whereupon she disrobed. Ferguson then identified himself as a police officer and placed her under arrest. They returned to the tavern, in the company of Detective McDonald, where Harris was arrested for being the keeper of a house of prostitution and for soliciting for the purposes of prostitution.

During his examination, Officer Ferguson first identified James Watkins as the bartender in question, but then corrected

himself and identified Harris as the bartender and Watkins as the man who was working behind the package goods counter. Defendant Johnson was not in the licensed premises at the time of the incident.

Jacob Harris testified that Officer Ferguson entered the tavern on the morning of March 11, 1966, and ordered a drink. Ferguson asked Harris about women and stated that he wanted to take one to a hotel. Harris stated he said to Ferguson, "You must be out of your mind--in this neighborhood, you must be out of your mind," to which Ferguson replied that he could take care of himself.

Harris further testified that a woman entered the tavern and Ferguson told him to take her a drink, which she refused. Ferguson then requested Harris to tell the woman he, Ferguson, wished to speak to her, which Harris did, but the woman called out to Ferguson that he would have to join her if he wanted to speak to her. Ferguson joined the woman and they engaged in a conversation which Harris stated he did not overhear. Ferguson and the woman left the tavern about 10 minutes later. Harris denied any knowledge the woman was a prostitute and stated that he did not steer Ferguson to her for the purpose of prostitution.

Defendant Johnson testified that Harris had been in his employ for two days prior to the arrest and that he was discharged on the day of the arrest. Johnson stated he knew Miss Gill, that she was not allowed in the tavern because she was dirty, weighed about 250 pounds and "looks like Bushman," and that his customers did not like anyone that dirty and ragged standing around their drinks. He further testified that she was barred from the tavern because she was dirty, and not because she was a prostitute. Defendant further stated he was unable to tell Harris to keep Miss Gill out of the tavern for the reason

that he had no opportunity to point her out to him because she did not come around when defendant was there.

James Watkins testified that he worked behind the package goods counter in the licensed premises and that he was working the night Harris was arrested. He stated he did not remember seeing Ferguson in the tavern on the night in question prior to the arrest and that he was not too busy that night.

The order of the Commissioner revoking the license of defendant Johnson contained findings that on March 11, 1966, Jacob Harris, bartender on the licensed premises, used the premises to steer a police officer for the purpose of prostitution, in violation of the ordinances of the City of Chicago and statutes of the State of Illinois, and that on said date Harris permitted a female to solicit a police officer for the purpose of prostitution on the licensed premises, in violation of the ordinances of the City of Chicago and statutes of the State of Illinois.

We are of the opinion that the circuit court erred in affirming the findings and order of the License Appeal Commission which reversed the findings and order of the Local Liquor Control Commissioner revoking the liquor license of defendant Johnson. It is clear that the evidence presented before the Commissioner, the trier of fact, was conflicting. The testimony of Officer Ferguson made out a case for the revocation of defendant Johnson's license. The evidence offered by defendant Johnson tended to show that no ordinance or statute was violated by Harris. It is apparent that only by reweighing the testimony of the witnesses and by completely ignoring the testimony of Officer Ferguson could the trial court and the License Appeal Commission reverse the findings and order of the Commissioner. It is well settled that under the provisions of the Administrative Review Act, the court has no authority to reweigh the evidence and make an independent determination of the facts, but is limited solely to a consideration of the record to determine if the findings and

orders of the administrative agency are against the manifest weight of the evidence. See Adamek v. Civil Service Commission, 17 Ill. App. 2d 11; Mitchell v. Sackett, 27 Ill. App. 2d 335,

Defendant Johnson maintains that "[n]o facts were presented to prove that defendant or his bartender knew that Zora Gill, when she entered the licensed premises, was a prostitute, or that the police officer was going to, or did, proposition or solicit Miss Gill for purposes of prostitution." Officer Ferguson testified that immediately upon entering the licensed premises he inquired of Harris as to the whereabouts of a woman for purposes of sexual intercourse. He further testified that Harris shortly thereafter directed his attention to Miss Gill, making the comment, "There is a girl who will take care of your business."

Defendant further contends that the testimony of Officer Ferguson was unbelievable in light of the fact that he initially identified Watkins as the bartender. Officer Ferguson, however, corrected himself, stating the man whom he first identified was the one working behind the package goods counter and that Harris was the bartender. The fact that the officer's testimony was uncorroborated does not render his testimony unbelievable as defendant maintains. The weight of the evidence does not depend on the number of witnesses testifying or on the amount of evidence compiled. Gump Co. v. Industrial Commission, 411 Ill. 196, 199-200,

The case of Daley v. License Appeal Commission, 54 Ill. App. 2d 265, cited by defendant in support of his position that there is no evidence that Harris steered Officer Ferguson for purposes of prostitution or permitted Miss Gill to solicit him for purposes of prostitution, is not in point. That case involved a situation where the prostitute approached the police

officer and solicited him for purposes of prostitution, the officer testifying on cross-examination that he did not know whether the bartender was paying attention to his conversation with the girl and that he did not inform the bartender of the solicitation but told him only that the girl made an offer to him of a "lay." Here, however, the facts show not only an awareness on the part of Harris that the act of solicitation for the purposes of prostitution was being committed on the licensed premises, but also an active participation in the act on the part of Harris.

For these reasons the judgment is reversed and the cause is remanded with directions to reverse the decision of the License Appeal Commission and to sustain the findings of the Local Liquor Control Commissioner.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

LYONS, P.J., and BRYANT, J., concur.

51940)
52118) Consolidated

RICHARD WALKER, a minor, by his mother and next friend GWYNNE MAYFIELD, Plaintiff-Appellant, vs. FIDEL C. SALINAS, Defendant-Appellee.) APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Plaintiff appeals from a judgment against him in accordance with a verdict in an action to recover damages occasioned by the alleged negligence of the defendant in driving his automobile. The issue is whether the judgment is against the manifest weight of the evidence.

The mishap occurred on July 22, 1958 at 7:30 P.M. at the intersection of Taylor and Ada Streets in Chicago. The weather was clear and it was daylight. There were no traffic controls at the intersection except a stop sign affecting traffic southbound on Ada Street. It is a residential neighborhood. The speed limit on Taylor Street is thirty (30) miles per hour. Ada Street does not cross Taylor Street; it enters Taylor Street on the north side and forms an inverted "T" intersection. The plaintiff was three years old when he was hit; hence no question relative to contributory negligence arises. The boy had gone from his home north of Taylor Street to a store on the south side of Taylor Street, in the company of a nine year old girl and was returning with her at the time he was injured. The evidence is in conflict as to whether at the time of the occurrence there were crosswalk lines on the east side of the intersection where the boy was injured.

No eyewitnesses to the occurrence testified at the trial. When the boy's mother arrived on the scene immediately after he was struck she found him out in the street, crawling in a southerly

direction toward the south curb. The car which struck him was standing still, facing east, and the boy was lying "right at the right hand end of the car." Although there were cars parked on the south side of Taylor Street there was an open space along the curb at the east crosswalk where there were no parked cars. This space was 15 or 20 feet in length, and the crosswalk was in the middle of it.

The testimony regarding the mishap was given by Police Officer Leonard M. Salva who arrived at the scene about ten minutes thereafter. He found that the defendant had been eastbound on Taylor Street, driving a 1955 Ford. The brakes on defendant's car were in good condition. The defendant had not been drinking. The officer said that there were no painted lines on the street for the crosswalk. There was no evidence as to whether plaintiff was running or walking at the time of the occurrence; nor was there any evidence that plaintiff was on or off the east crosswalk just before the occurrence, except such deductions as might be made from the place where the mother found the plaintiff. The defendant told Officer Salva he was going 15 to 18 miles an hour before the occurrence; that he did not see the boy; that after the impact he traveled about 10 feet; that the boy came out from between parked cars; that the right front door of the car came into contact with the boy and that the boy ran into the right front door. Officer Salva examined the automobile. He found some clean spots on the right front door where the front part of the door breaks open upon the fender.

Plaintiff, in support of his argument that the judgment is against the manifest weight of the evidence, points out that this is not a dart-out case where a child comes into the street from between cars in the middle of the block; that the mishap occurred at a crosswalk where the plaintiff, as a pedestrian, had the right of way, that the motorist was under the duty of yielding to him and

that where the plaintiff stepped out there was an open space of 15 to 20 feet and the crosswalk was in the middle of it. Plaintiff argues that the testimony supporting the verdict is unbelievable; that the story the defendant told the police officer about not seeing the plaintiff until the collision cannot be accepted as true; or if accepted, leads to the conclusion that the defendant was not keeping a lookout in the direction in which he was traveling and was therefore negligent.

There is no evidence as to whether plaintiff was walking or running or whether plaintiff was on or off the crosswalk while attempting to cross the street. The evidence shows that the boy came into contact with the right front door of defendant's car at a point at or just back of where the door meets the fender. From the evidence the jury had a right to decide that defendant was driving his car at a reasonable speed under the conditions prevailing and that he was observant of conditions. The driver stopped immediately. There is nothing incredible about defendant's version of the occurrence.

The jurors saw and heard the witnesses, heard extensive arguments of counsel and were fully instructed on the law applicable to the facts. From the evidence the jury had a right to decide that the defendant was not negligent. There is no reasonable basis for disturbing the verdict. Therefore, the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BRYANT, J. concur.

51589

C. H. JOHNSON, Plaintiff-Appellant, vs. RAYMOND M. BONDY, as Trustee; RAYMOND M. BONDY; GEORGE HOY; GEORGE HOY, Trustee Under Trust Deed Recorded as Document No. 10991881; and Unknown Owners, Defendants. JENNIE WASSERMAN and LOUIS SHAPIRO, Intervenor Defendants-Appellees.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This case originated from an action filed by plaintiff, C. H. Johnson, on April 17, 1962, to confirm and establish title through adverse possession against the original defendants, Raymond M. Bondy and George Hoy, individually and as trustees, as well as certain Unknown Owners.

The property involved was a tract of vacant real estate located at approximately 4028 North Tripp Avenue in the City of Chicago. Shortly prior to the commencement of his action, plaintiff had entered into a contract, dated March 5, 1962, with Nickey Chevrolet Sales, Inc., whereby he agreed to lease the vacant premises to the latter at a bimonthly rental of $400.00. The terms of that lease expressly provided to be subordinate to: ". . . dispossession by reason of superior title, ..."

On May 21, 1962, the instant defendant, Jennie Wasserman, was granted leave of court to intervene upon her verified petition which alleged ownership in her of the realty in fee simple. Subsequently upon motion of said intervenor, plaintiff's action was dismissed for want of equity, the cause again

being referred to the Master for a determination of the interests, if any, of the intervenor. No questions are raised on that adjudication, plaintiff having advised this court of his election to waive his right to appeal therefrom. Thereafter, Louis Shapiro was joined as an additional party defendant and declared by the court to be the true party in interest, Jennie Wasserman having been found to be acting merely as the former's nominee.

This appeal is now taken by plaintiff from the entry of a decree by the Circuit Court of Cook County on May 9, 1966, which decree, upon its approval of the findings and recommendations of the Amended Final Report of the Master, vested title to the real estate, in fee simple, in intervenor-Wasserman. Said decree directed payment, accordingly, to Shapiro of all rental proceeds ($5,927.10) then on deposit in a joint escrow account which had been created by agreement on November 13, 1963, pending the determination of the case at bar, and similarly entered judgment against plaintiff and in favor of Wasserman for the aggregate value of rents received by plaintiff subsequent to May of 1962 but prior to the creation of the escrow arrangement, less a credit to plaintiff for his payment of certain real estate taxes from and after 1950. The amount of that judgment was $2,608.59. The Chancellor, in his decree, taxed Master's fees equally between the parties, a judgment being entered against plaintiff and in favor of the Master for his share thereof ($750.00).

It is plaintiff's theory of the case: (1) that the court erred in declaring the intervenor owner of the title to the parcel in question, there having been offered no evidence whatsoever to sustain such a determination, and (2) that the court further erred in awarding the rents subsequent to the date

of intervention (May of 1962) to defendants.

It is defendants' theory of the case: (1) that the evidence adduced before the Master manifestly supports the decree entered on either of the alternative theories of relief advanced, and (2) that the findings of the Master, as approved by the Chancellor, cannot be disturbed on review absent a showing that they were contrary to the manifest weight of the evidence.

Essentially, the question presented is one of law only, as plaintiff is in basic agreement with defendants' proffer below of the sequence of heirship and deeds of conveyance from Jennie Wasserman's purported predecessors in title respectively. Plaintiff is admittedly a stranger to the title at issue. Those facts which appeared were as follows:

1. Prior to 1902: Title to the premises was vested in Wilford C. Toles and Emily A. Toles (husband and wife) jointly.

2. June 19, 1902: The W. C. Toles Company was caused to be incorporated under the laws of the State of Illinois, Wilford C. Toles being the true and real owner of all of the outstanding shares of stock in said corporation.

3. June 26, 1902: Wilford C. and Emily A. Toles executed a joint conveyance by warranty deed of the subject property to the W. C. Toles Company.

4. September 26, 1914: Lillian Toles Pollard, the only child born or adopted of the marriage of Wilford C. and Emily A. Toles, died intestate without any children of her own surviving.

5. April 25, 1923: Emily A. Toles died intestate being survived only by her husband, Wilford C.

6. January 30, 1930: Wilford C. Toles died intestate.

7. June 29, 1931: Fanny Toles Cary (married to Woodridge George Cary), the surviving sister of Wilford C. Toles, deceased, executed a power of attorney in regard to her intestate distributive rights in her brother's estate to Paymond M. Bondy, an attorney at law and husband of Sarah Cary Bondy, Fanny Toles Cary's only child.

8. July 14, 1930: The administrator of the estate of Wilford C. Toles, deceased, filed in the County Court of McHenry County, Illinois (situs of residence of said deceased) a certified copy of Order of Heirship in the estate, which document named Fanny Toles Cary (sister) and Arthur Raymond Toles (nephew) as the deceased's only surviving heirs at law. After consideration of argument on the subject, the court thereupon entered its order of approval thereof.

9. September 8, 1931: Arthur Raymond Toles likewise executed a power of attorney to Raymond M. Bondy in regard to the Wilford C. Toles estate, similarly directing the administrator thereof to turn over all of the remaining assets of said estate in kind to Bondy.

10. September 21, 1931: The administrator of the Toles' estate filed his final petition in the matter, which petition listed the assets of the estate as certain real estate located in the City of Chicago (not further described) plus 350 shares of stock in the W. C. Toles Company. Such accounting, in addition, represented the debts of the estate as having been fully discharged by payment from Bondy and expressly acknowledged Bondy's powers of attorney to receive all monies and property due and owing Fanny Toles Cary and Arthur Raymond Toles in settlement of the estate. The final disposition of the estate by order of the court, however, does not appear of record in the instant proceedings.

    On the same date (September 21, 1931), the W. C. Toles Company, by Fremont Hoy, its president, executed a conveyance (duly recorded in Cook County on October 21, 1931) of the property by standard warranty deed, which deed designated, in its body, as the only grantee thereof;

    > "Raymond M. Bondy, Trustee, of the City of Chicago, County of Cook, State of Illinois."

11. 1932: Raymond M. Bondy and his wife, Sarah Cary Bondy, were divorced in Cook County, Illinois, with only one surviving child having been born or adopted of their marriage; viz, Elizabeth Bondy Robinson, the wife of James S. Robinson.

12. June 21, 1933: Woodridge George Cary, husband of Fanny Toles Cary and father of the former Sarah Cary Bondy, died.

13. November 7, 1944: Arthur Raymond Toles died testate leaving his entire estate, by the terms of a joint and mutual will, to his sole survivor and wife, Juanita D. Toles. No children had been born or adopted of their marriage.

14. December 19, 1944: The W. C. Toles Company was

dissolved pursuant to involuntary dissolution proceedings filed in the Circuit Court of Sangamon County, Illinois. In this conjunction, Raymond M. Bondy (presumably by virtue of his powers of attorney in regard to the final disposition of the estate of Wilford C. Toles, deceased) conveyed his entire right, title and interest in the 350 shares of stock in that corporation to Fanny Toles Cary and Arthur Raymond Toles. As to the latter transferee, the record is ambiguous inasmuch as Arthur Raymond Toles, by the chronology offered, predeceased the dissolution of the W. C. Toles Company and possibly, as well, the purported distribution of stock by Bondy. The exact date of that conveyance does not appear.

15. May of 1947: Fanny Toles Cary died intestate being survived by her only heir at law, Sarah Cary (Bondy). Fanny Toles Cary had never remarried or had any other children subsequent to her husband's death in 1933. Sarah Cary (Bondy) however had remarried to John Hal Ressler with no children having been born or adopted of her second marriage.

16. July 31, 1959: Raymond M. Bondy died intestate being survived only by (1) Frances M. Bondy, his wife by a second marriage; (2) Elizabeth Bondy Robinson, the only child of his first marriage to Sarah Cary Ressler; and (3) said Sarah Cary Ressler. No children had been born or adopted of his second marriage to Frances M. Bondy, nor did she remarry after his death.

17. May of 1962: In May of 1962, but prior to her intervention in the case at bar on May 21, 1962, Jennie Wasserman obtained four quitclaim deeds as grantee thereof, all of which purported to convey the respective grantor/s' entire right, title and interest in the demised property in question. All recorded on May 16, 1962, they were:

    a. May 4, 1962: from Juanita D. Toles
    b. May 9, 1962: from John Hal and Sarah Cary Ressler
    c. May 14, 1962: from Frances M. Bondy
    d. May 15, 1962: from James S. and Elizabeth Bondy Robinson

    Each of the aforesaid conveyances was followed by respective assignments of all of the rents, issues and profits in and from the premises so demised.

Intervenor submits, in the alternative, to be the owner in fee by virtue of her acquisition of deeds from the predecessors in title of either: (1) Fanny Toles Cary and Arthur

Raymond Toles, as the intended, but unnamed beneficiaries of the deed in trust to Raymond M. Bondy, or (2) Raymond M. Bondy, the designation "Trustee" in the deed of conveyance to him being merely descriptio personae of his identity, he thereby having been vested with absolute title.

Plaintiff does not quarrel with the propriety of intervenor's alternative pleadings and proofs. He does however seize upon the repugnant and mutually defeating nature of the evidence advanced in support of these two diametrically opposed points of law. Plaintiff cites, in particular, the testimony of Elizabeth Bondy Robinson in this regard. Mrs.Robinson, by evidence depositions taken in March and July of 1965, represented to have been present at certain conversations between her great-uncle, Wilford C. Toles, and her father, Raymond M. Bondy, during the course of which she stated Toles had requested her father (Raymond M. Bondy) to act as the trustee of the disputed property for the benefit of Fanny Toles Cary and Arthur Raymond Toles. She similarly stated that her father had informed her that he was acting in that capacity. The witness fixed these conversations as having occurred in or about the year 1925, at which time she was approximately 14 years old. Mrs. Robinson was, by her own admission, ignorant of any subsequently executed writing to evidence the oral arrangement to which she had testified.

Plaintiff argues that intervenor, being bound by the statements of Mrs. Robinson, her own witness, is precluded from asserting her absolute conveyance theory. Yet, as that same testimony lends insight and credence to intervenor's intended trust theory, plaintiff assails both the competence and credibility of the deponent's narration. He takes the position that as a consequence of the mutually contradictory facts offered, the net effect of intervenor's efforts was to succeed in submitting

no evidence whatsoever to sustain either proposition of law. Suffice to say, countenance cannot be afforded such a contention for it would operate as a subterfuge to the provisions of our Practice Act which have authorized pleading in the alternative, and as necessarily incident thereto, that the pleader be permitted to adduce proofs in support of each, regardless of consistency. McCormick v. Kopmann, 23 Ill.App.2d 189, 161 N.E. 2d 720 (1959); 7 I.L.P. 395. Intervenor was admittedly without knowledge of the true state of facts.

Where, as in the case at bar, the Chancellor heard no testimony in open court, the rule that his findings will not be disturbed unless contrary to the manifest weight of the evidence, does not obtain. Maley v. Burns, 6 Ill.2d 11, 126 N.E. 2d 695 (1955). That fact notwithstanding however, where the Chancellor concurs in and approves the Master's findings as here, such findings of the Master are deemed to be more than advisory, and will in their own right not be disturbed unless against the manifest weight of the evidence. Strilky v. Levy, 33 Ill.App.2d 91, 178 N.E.2d 694 (1961). Particularly as it relates to the much controverted testimony of Elizabeth Bondy Robinson, we have observed that neither the Amended Final Report of the Master, nor the decree of the Chancellor, designate upon which of the alternative bases of relief judgment had been predicated. Accordingly, a somewhat out of the ordinary situation presents itself, wherein, to the extent the record permits, this court is called upon to ascertain the degree of credibility attached below to her account of the agreement between Wilford C. Toles and Raymond M. Bondy.

Notwithstanding Mrs. Robinson's testimony to the contrary, considered independently, we feel intervenor offered sufficient evidence to sustain the finding that an absolute

conveyance in fee to Raymond M. Bondy was intended, the suffixion of the term "Trustee" being merely descriptio personae of his true identity, and surplusage. While it may be argued that the rule of descriptio personae has traditionally found limited application in the courts of this state to situations involving the misnomer of a necessary party in court orders, process or the like: See Goff v. Will County Nat. Bldg. Corp., 311 Ill.App. 207, 35 N.E.2d 718 (1941); and Lemmons v. Sims, 326 Ill.App. 97, 61 N.E.2d 764 (1944), we think, however, there exists persuasive and sufficient authority for its application to the facts of the instant case.

In an annotation appearing in 137 A.L.R. 460 at 462, the rule is stated as follows:

> ". . . in the absence of competent evidence to show the elements of a trust, the use of the words 'trustee' or 'as trustee' following the name of the grantee in a deed which does not otherwise evidence any trust is not effective to create a trust, the effect of the deed is to convey the absolute title to the grantee, and the use of such words does not prevent the absolute title from passing by conveyance from such grantee to third persons, ..."

Requisite to the creation of a valid trust, there must be described with reasonable certainty, the subject res embraced within the trust, the names of the beneficiaries in whose behalf the trust is created, the nature and extent of the respective interests of those beneficiaries, and the manner in which the trust is to be administered. Maley v. Burns, 6 Ill. 2d 11, 126 N.E.2d 695 (1955); Knapp v. Hepner, 11 Ill.2d 96, 142 N.E.2d 39 (1957).

Here, even were this court to consider Toles' declarations in 1925 as an attempted oral inter vivos conveyance in trust, a contrary conclusion cannot be heard to obtain. To impress a trust upon property by parol evidence requires that each of the aforesaid elements of a trust be established by such

clear and convincing proof that but one conclusion can be reached by the court. Maley v. Burns, 6 Ill.2d 11, 126 N.E.2d 695 (1955); Knapp v. Hepner, 11 Ill.2d 96, 142 N.E.2d 39 (1957). In this respect, at least, Mrs. Robinson's testimony was totally insufficient.

As to the written conveyance itself, while the intention of the settlor in construing a trust agreement may be gathered from extrinsic circumstances, Continental Nat. Bank v. Clancy, 18 Ill.2d 124, 163 N.E.2d 523 (1959), in the case at bar there existed no competent evidence to show the intended beneficiaries thereof or the duties to be performed, if any, by the trustee. The rule is well established that parol testimony of alleged conversations, either prior to, or contemporaneous with, the execution of a deed of conveyance is inadmissible to vary or contradict the terms of the otherwise unambiguous written document. Zimmerman v. Schuster, 14 Ill. App.2d 535, 145 N.E.2d 94 (1957). Here, the deed of September 21, 1931 was clear and unambiguous on its face in respect to the beneficial interest conveyed, the only ambiguity arising being a creature of the testimony of the deponent, Mrs. Robinson.

The deed being totally silent in this respect, the testimony of Mrs. Robinson was inadmissible and hence incompetent on that subject, testimony which the Chancellor is presumed to have rejected in rendering his decree. Head v. Wood, 20 Ill. App.2d 97, 155 N.E.2d 348 (1959). The testimony of Elizabeth Bondy Robinson, moreover, would lend little or no probative force to a contrary conclusion, even were this court to assume her parol account of the Toles-Bondy relationship to be competent to establish the absent terms of the purported conveyance in trust to her father.

Toles' alleged declarations were made, if at all, six

years prior to the execution of the deed to Bondy at which time Toles could not have known that his sister and nephew would, in fact, survive him. No evidence, furthermore, was offered below to show that his intentions remained unchanged until his death five years later. The deponent was quite young at the time of these discussions and had admittedly been unaware of any written trust agreement. Similarly, we note that while testifying in person on September 23, 1963 (prior to the taking of her two depositions), the witness had made no mention whatsoever of the alleged conversations. Most importantly, as of the date of his alleged declaration of trust to Bondy, and notwithstanding his exclusive ownership of the stock in his namesake corporation, Wilford C. Toles possessed no present and existent property right in the subject matter of the would-be trust. Title was in the W. C. Toles Company as of 1902, to which Toles had access as a shareholder. In Re Brown's Ex'r., 226 N.Y.S. 1, 130 Misc. Rep. 865 (1927), Restatement of the Law, Trusts 2d (1959) §75 and 86; Cf. General Corporation Act of 1919 [Ill.Rev.Stat.(1925) Chap.32, par.17], which vests control of the proprietary functions of the corporation in a three (minimum) man Board of Directors. At best, Toles' declarations amounted to no more than a promise to create a trust en futuro which has not been shown to have been effectuated during his lifetime. Bogert, Trusts and Trustees, 2nd Ed. (1965) §113.

Within this perspective, we feel the cases of United Brethren Church v. First M.E. Church, 138 Ill. 608, 28 N.E. 829 (1891) and Hart et al. v. Seymour et al., 147 Ill. 598, 35 N.E. 246 (1893) are dispositive of this appeal. In United Brethren, where the rule of descriptio personae was urged by the appellee in affirmance, there was a conveyance executed by warantee (sic)

deed, "to A, B and C, trustees of the United Brethren Church, and their successors in office, of the City of Moline," with no further description of a beneficiary. In its action to eject the appellee, appellant-United Brethren offered testimony to the effect that approximately nine years prior to the conveyance said A, B and C had been elected to act merely as trustees for the appellant-Church. While not expressly adopting the appellee's theory of descriptio personae, the court there said in affirming the judgment:

> ". . . in the case at bar there is no express trust created. The deed made by Morphy (grantor) does not convey the lot to the grantees in trust for, or to the use of, the Church; it does not even convey it to them as trustees." (Insert supplied)

So too in the Hart case the rule of descriptio personarum was argued by the appellee. In that case there were conveyances by Sheriff's Deeds to A, B and C, "trustees of the Norwood Land and Building Association," and "to their heirs and assigns forever." Citing two earlier decisions, wherein the rule of descriptio personarum was employed, the Hart court, in affirming the judgment, stated:

> ". . . if the question of title is to be determined solely from what appears upon the face of the deeds, it is not sufficiently shown that any trust whatever is declared, ... The deeds both run to Tyler, Field and Eberhardt, 'trustees of the Norwood Land and Building Association,' and 'to their heirs and assigns forever.' This was of itself no declaration of trust, but, prima facie, conveyed an absolute title to the grantees named."

Applied to the instant case, we have found that there was produced no competent or credible evidence to establish the identity of any beneficiary. The form of conveyance involved, we observe, was that of a standard warranty deed under seal. No trust deed or written agreement in trust was ever brought to the attention of the court.

The use of the term "Trustee" may have been employed

as descriptive of Bondy's fiduciary capacity within the language of the final report in the Toles' estate, which had gone on file that same day in the same county. It may have been intended simply as a matter of convenience. It may have been employed as a device to avoid creditors of the grantor-corporation. For just what reason it did appear would invite conjecture on our part. The record does, nonetheless, graphically bear out that Bondy was no stranger to the interests of either Wilford C. Toles or his namesake corporation. In any event, we feel the evidence adduced by intervenor was sufficient to support the conclusion that the insertion of the term "Trustee" was merely descriptio personae of the grantee's true identity and surplusage, an absolute conveyance in fee to Raymond M. Bondy having been thereby effectuated.

Plaintiff, in addition, as an admitted stranger in interest, is devoid of legal standing to question the authority of Fremont Hoy, as President, to convey in behalf of the grantor-corporation. The evidence of the nonpayment of taxes and assessments on the property from and after 1928 is, at best, susceptible of numerous connotations and to which this court attaches no probative significance.

Accordingly, by her acquisition of quitclaim deeds and assignments of rents, issues and profits from the intestate heirs at law of Raymond M. Bondy, deceased, the court below did not err in adjudging intervenor, Jennie Wasserman, the owner in fee simple of the premises. Nor did the court err in declaring Jennie Wasserman and defendant-Shapiro, by the authorities relied upon by plaintiff, to be entitled to all the rents accruing from and after the Wasserman's intervention. In this regard, plaintiff cannot escape the subordinating language of his lease agreement, nor the fundamental doctrine of the relation back of the judgment.

In answer to plaintiff's contentions, we can find no abuse of discretion by the Chancellor in assessing $750.00 in Master's fees against him, plaintiff having pursued the matter after the dismissal of his original action as an admitted stranger to title and trespasser.

For the above reasons, the decree is affirmed.

DECREE AFFIRMED.

BURKE, J., and BRYANT, J., concur.

89 I.A. 216
NO. 67-53

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ROBERT GEASCHEL,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the Circuit Court of
vs.	)	St. Clair County.
	)	Honorable Joseph E.
DONALD ROKITA,	)	Fleming, Judge
	)	Presiding.
Defendant-Appellee.	)	

Goldenhersh, J.

Plaintiff appeals from the judgment of the Circuit Court of St. Clair County entered on a jury verdict in the amount of $450.00 in plaintiff's action for personal injuries.

Plaintiff contends that the verdict is inadequate and the trial court erred in denying his post trial motion wherein he sought a new trial on the issue of damages only, or alternatively, a new trial.

This suit arises from a collision between vehicles driven by plaintiff and defendant on August 16, 1963. Plaintiff's principal argument for reversal is that the trial court erred in permitting defendant, in his cross examination of plaintiff, and of a physician called by plaintiff, to inquire about a fall suffered by plaintiff on August 7, 1964.

Plaintiff relies upon Marut v. Costello, 34 Ill. 2d 125, and Caley v. Manicke, 29 Ill. App. 2d 323, 24 Ill. 2d 390. An examination of the testimony shows this case to be clearly distinguishable.

A physician called by plaintiff testified that he examined plaintiff on September 16, 1963. At that time plaintiff complained of pain in the back of his neck radiating into the back of his head,

and his shoulders, and pain in the low back radiating into his legs, chiefly his right leg. When again seen by the witness on February 14, 1964, his complaints were the same.

On October 5, 1964, when he again saw plaintiff, he complained that the pain had become more severe. He made no mention of a fall on August 7, 1964.

Plaintiff testified that while working on August 7, 1964, he had fallen approximately 8 feet, had struck his side on a joist, and had landed on his feet. The physician who treated him at that time testified that upon examination, plaintiff was found to have contusions, abrasions and hematoma of the right side, over the area from just below the ribs to just above the crest of the ilium in the axillary line. This witness testified that there was no injury to plaintiff's neck or shoulders in the fall, and that X-rays of the lower back were negative.

Plaintiff was claiming a possible injury to an intervertebral disc in the lumbar area. His medical witness testified that he had made a diagnosis of discogenic pain syndrome in the neck, and a ruptured lumbar disc, and the trauma suffered in August 1963, might or could have caused the condition to which he testified. On cross examination, he stated that his opinion had been formulated without knowledge of the fall in August 1964, and that upon taking the fall into consideration "it wouldn't be possible to state with any degree of certainty which one did what".

In view of the fact that plaintiff was claiming injury to an intervertebral disc in the lumbar area, and the testimony of the physician who treated him after the occurrence in August 1964 shows injury to an area in close proximity to the lumbar area,

this case, on its facts, is similar to Palsir v. McCorkle, 70 Ill. App. 2d 425, and distinguishable from Marut v. Costello (supra). For the reasons expressed, we hold that the trial court did not err in permitting defendant to cross examine the plaintiff and the physician with respect to the subsequent occurrence.

Because of plaintiff's contention that the verdict is the result of passion and prejudice we have examined the entire record, and find that the court erred in a number of instances in its rulings on evidence.

In People ex rel Noren v. Dempsey, 10 Ill. 2d 288, at 293, the Supreme Court said "The basic principle that animates our law of evidence is that what is relevant is admissible. Exceptions to that principle must justify themselves."

The record before us is replete with general objections which were sustained by the court, and of instances where specific objections were sustained, although based on improper grounds. The rule applicable to general objections is stated in Johnson v. Bennett, 395 Ill. 389 wherein at page 398, the Court said "On this offer the court sustained a general objection. This, of course, presented the question as to whether or not it was material to the issues before the court. Specific objection to evidence must be made in all instances where the objection, if specifically pointed out, might be obviated or remedied. Such objection must be specific so as to afford the adverse party an opportunity to make correction. (Illinois Iowa Power Co. v. Rhein, 369 Ill. 584.) However, a specific objection to the admission of evidence is unnecessary where it is manifest that the offered proof has no probative value whatever. The general objection raises the question of relevancy

and materiality, only."

The rule applicable to specific objections is stated in The Terre Haute and Indianapolis Railroad Company v. Voelker, 129 Ill. 540, wherein at page 548 the Supreme Court said "A specific objection based solely upon a particular fact is, strictly, a waiver of all objections based upon other facts not specified or relied upon. This rule is based upon the equitable consideration that, if the other objections had been made, it might have been within the power of the party offering the evidence to obviate them."

The following examples, although not all-inclusive, are illustrative of the error to which we refer.

Upon defendant's objection the trial court refused to permit plaintiff's counsel to propound a hypothetical question to a physician on the ground that he was a treating physician. This ruling was clearly erroneous. Ruggles v. Selby, 25 Ill. App. 2d 1, l.c. 10. Chicago Traction Co. v. Roberts, 229 Ill. 481. An expert may base an opinion upon personal observation, a hypothetical presentation or a combination of both. Sherman v. City of Springfield, 77 Ill. App. 2d 195.

The court sustained an objection and struck testimony of plaintiff's physician "because he stated his complaints were all subjective". This was a treating physician and the ruling was clearly erroneous. Shell Oil Co. v. Industrial Commission, 2 Ill. 2d 590.

Plaintiff's counsel asked the physician whether the occurrence of August 16, 1963 was sufficient to cause the headaches of which Mr. Geaschel complained. Defendant's counsel objected as follows: "We object to the form of that question, your Honor. That would

again be a subjective complaint without any objective findings."

The court sustained the objection, and in so doing, erred. Placher v. Streepy, 19 Ill. App. 2d 183, 189.

In Belfield v. Coop, 8 Ill. 2d 293, at page 313, the Supreme Court said "If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon."

Harassment by interposition of repetitive groundless objections may as effectively deprive a litigant of a fair trial as does improper prejudicial argument. In Hux v. Raben (Docket No. 40257 - Agenda 22 - May 1967) the Supreme Court has recognized that "the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the considerations of waiver that stem from the adversary character of our system."

Had the plaintiff raised and argued the cumulative effect of the errors here enumerated, it is possible that this court might have held that the plaintiff was, by reason thereof, deprived of a fair trial, and remanded the cause for a new trial. We are reluctant, however, to grant such relief on grounds discovered in our review of the record without the assistance of the appellant, and under circumstances where the defendant has not had an opportunity to brief and argue the issues.

Upon reviewing the record we cannot say that the damages awarded are so palpably inadequate as to require reversal. Since we have resolved the only issue made with respect to rulings on evidence adversely to plaintiff's contention, and no error is

claimed in the instructions to the jury, the judgment will be affirmed. Corsello v. Warren, 51 Ill. App. 2d 367.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

NO. 67-86

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

OLIVER K. HALVERSON, HENRY D. PIPER, ROBERTA B. PIPER, ISAAC PARSONS BRACKETT, GWENDOLYN BERTHA CONRAD BRACKETT, WILLIAM STOKES, FRANCES STOKES, FIRST NATIONAL BANK OF MURPHYSBORO, a Corporation, Not Personally, But as Trustee Under Trust Dated February 15, 1965, Known as Trust No. 50-A, ROBERT L. MORGAN, LOIS D. MORGAN, GUY ANTHONY RENZAGLIA, JOSEPHINE E. RENZAGLIA, WILLIAM C. WESTBERG, HELEN G. WESTBERG, GILBERT C. REIMAN, FRANK HAMILTON SHAW, MILDRED SHAW and FRANCIS J. KELLEY, Plaintiffs-Appellants, vs. COUNTY BOARD OF SCHOOL TRUSTEES OF JACKSON COUNTY, ILLINOIS, MURPHYSBORO COMMUNITY UNIT SCHOOL DISTRICT #186 JACKSON COUNTY, ILLINOIS, CARBONDALE ELEMENTARY SCHOOL DISTRICT 95 JACKSON COUNTY, ILLINOIS, CARBONDALE HIGH SCHOOL DISTRICT #165 JACKSON COUNTY, ILLINOIS, JAMES C. BLACKWOOD and JOHN WATHEN, Defendants-Appellees.	Appeal from the Circuit Court of Jackson County, Illinois. Honorable Everett Prosser, Judge Presiding.

Goldenhersh, J.

Plaintiffs appeal from the judgment of the Circuit Court of Jackson County entered in an action brought under the Administrative Review Act (Ch. 110, secs. 264 et seq., Ill. Rev. Stat. 1965) seeking reversal of a decision of the County Board of School Trustees.

Plaintiffs, all of whom are residents of, or property owners in, the territory involved, filed a petition in the manner provided in section 7-6 of the School Code (Ch. 122, Ill. Rev. Stat. 1965) to detach territory comprising approximately 400 acres, from Murphysboro Community Unit School District No. 186, and annex it to Carbondale Elementary School District 95, and Carbondale High School District 165.

After a hearing, the County Board of School Trustees of Jackson County entered an order denying the petition. Plaintiffs sought administrative review, the circuit court affirmed, and this appeal followed.

The Superintendent of Schools of Jackson County, called by plaintiffs, testified as to the area of the districts, their assessed valuation, tax rates, enrollment, teachers, and pupil-teacher ratios, and stated that in his opinion granting or denying the petition would not materially affect the educational program of any of the three districts involved. He did not know the assessed valuation of the land described in the petition, but was of the opinion that it would not materially affect any of the districts.

The territory sought to be detached is in process of development as a residential area. Its central feature appears to be a man-made lake called Lake Chautauqua, and most of the land is part of what is known as the Lake Chautauqua development. The distance from East Gate Drive, the principal entry route to the area, to the high school in the Carbondale District is .3 of a mile greater than to the high school in the Murphysboro District. The distance to the nearest elementary school in the Carbondale District is .6 of a mile greater than to the elementary school in the Murphysboro District.

Plaintiff, Gilbert Reiman, a real estate broker, and one of the managing agents for the developers, testified that a market feasibility analysis of the area showed that most of the future residents would be "oriented to the Carbondale economy", and that 90% of the persons who had expressed interest in purchasing lots are either Carbondale businessmen or members of the faculty at Southern Illinois University at Carbondale. He stated the land would be "worth 10% more" if in the Carbondale District.

Plaintiff Francis J. Kelly lives in the territory sought to be detached and is a teacher employed at Southern Illinois University. He has two children, 11 and 9 years of age. Prior to September 1, 1966 he had lived in Carbondale and his children had attended school in District 95. At the time of the hearing (October 1966) his children were attending school in District 186. The children are happy in their new school. There is little difference in the districts at the elementary level, but the Carbondale High School District (District 165) is superior to District 186 in that it offers greater diversity in foreign languages and mathematics, and has an honors program. Most of the family's shopping is done at Carbondale, and most of their friends and associates live there. It would be more convenient for the children to go to school in Carbondale, and would make it easier for them to engage in after school activities.

Betty Renzaglia testified that her husband is a professor at Southern Illinois University, the family attends church and does most of its shopping in Carbondale. They have no children presently attending elementary school but they have a child of preschool age, a child attending Southern Illinois University and four children attending University School. (Not further identified but presumably connected with Southern Illinois University at Carbondale). Most of their children's friends are at Carbondale.

Oliver Halverson lives in Carbondale and owns a lot near Lake Chautauqua. He has not built a home there because he does not wish to move his children, age 14 and 15, from the Carbondale school district.

William C. Westberg is employed at Southern Illinois University. He has one child of high school age. He has not built a home in the

Lake Chautauqua development because he does not want to move his son from the Carbondale school district. He is familiar with both school systems and Carbondale's is far superior.

Roberta Piper has children 6 and 11, has had experience in both districts and desires annexation to Carbondale because her husband is employed there, and because the greater convenience in travel will enable her children to expand their participation in extra-curricular activities.

James Blackwood, superintendent of District 186 testified that the tax levy for the building fund is at the maximum, that for the educational fund it was slightly below the maximum, but would be at the maximum rate for the ensuing year, that District 186 offered Spanish and Latin at the high school level and Spanish at the seventh and eighth grade level. The district offers five years of high school mathematics. It has classes for retarded children at the elementary, junior high, and high school levels. It does not have department chairmen, it uses building principals, but does have chairmen for language, arts, social studies and sciences. It uses a track system in languages, arts, and mathematics, but has no honors program. It has a guidance staff with a full time director and counselors. If it had more of a tax base, and if students desired it, it could offer French and German.

John Wathen, Assistant Superintendent of Schools of District 186 testified that he was chairman of transportation, that the district operates a bus route through the territory sought to be detached, and in anticipation of the development of the area has acquired a 66 passenger bus for use there.

Section 7-6 of the School Code provides that upon completion

of certain requirements and procedures enumerated, "The county board of school trustees shall hear evidence as to the school needs and conditions of the territory in the area within and adjacent thereto and as to the ability of the districts affected to meet the standards of recognition as prescribed by the Superintendent of Public Instruction, and shall take into consideration the division of funds and assets which will result from the change of boundaries and shall determine whether it is to the best interests of the schools of the area and the educational welfare of the pupils that such change in boundaries be granted,.....".

In School Directors of School District No. 82, et al v. Keith Wolever, 26 Ill. 2d 264, the Supreme Court at page 267, said: "Upon administrative review, the role of the judiciary is merely to determine if this determination is against the manifest weight of the evidence. (Bucholz v. Cummins, 6 Ill. 2d 382; Logan v. Civil Service Com. 3 Ill. 2d 81.) The judiciary is ill equipped to act as a super school board in assaying the complex factors involved in determining the best interest of the schools and the pupils affected by a change in boundaries. Nevertheless, we must determine if the standards prescribed by the legislature are complied with."

There is no evidence in this record as to the assessed valuation of the land to be detached. It cannot be determined from the evidence how many children will be affected by the proposed detachment, nor how many are presently attending school at either the high school or elementary level, in District 186. There is no evidence with respect to available transportation between the affected area and Carbondale, either by school bus or public utility.

Plaintiffs argue that the facts in this case are similar to those found in Burnidge v. School Trustees of Kane County, 25 Ill. App. 2d 503. Upon examination of that opinion we find many distinguishing facts. Here, unlike in Burnidge, the distances to the schools are approximately equal; here, also, there is no evidence that the area involved has historically been identified with the districts to which annexation is sought. Although the witnesses expressed opinions that annexation to Carbondale would result in greater convenience, there is an absence of testimony of facts upon which the opinions of greater convenience are based.

Plaintiffs cite Burgner v. County Board of School Trustees, 60 Ill. App. 2d 267 in support of their argument that the Circuit Court erred in its decision. In that case the opinion reflects a much greater difference between the districts affected, and unlike the record here, there is detailed testimony as to the courses of study offered, library facilities, and social and athletic programs. There was also evidence of the bus service available in the district to which the area was annexed.

Upon review of the record we cannot say that the decision of the trustees is not supported by substantial evidence, and the judgment of the Circuit Court of Jackson County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

No. 67-25

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

BETH SCOFIELD, Plaintiff-Appellant vs. LOUIS I. BEHM, JOSEPH N. SIKES, and EDWARD J. KIDERA, Defendants-Appellees	)	Appeal from the Circuit Court of Lake County, Illinois.

MR. JUSTICE BAUER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Lake County dismissing a petition filed under Section 72 of the Civil Practice Act and a subsequent order denying a motion to rehear, vacate or reconsider.

This litigation has a long history in the various levels of the court system in Illinois, having been, in one phase or another, before various of the Judges of the Circuit Court of Lake County, the Appellate Court and the Supreme Court. Rather than recite the many aspects of the case already ruled upon by the appellate tribunals, we shall define the posture of the case for purposes of the matter immediately before this court.

This suit was commenced in the Circuit Court on July 18, 1962 and on December 14, 1962, it was dismissed with prejudice. After a change of plaintiff's counsel, a petition to vacate the order of dismissal was denied on the 26th of July 1963.

The plaintiff renewed her attack, through a new counsel, by filing notice of appeal under Section 76 of the Civil Practice Act. The Appellate Court, Second District, denied leave to file the appeal on October 6, 1964, and denied a certificate of importance on the 9th of October 1964. In March 11, 1965, the Supreme Court dismissed an appeal from the orders of the Appellate Court.

Unfortunately, this failed to put the matter to rest. The plaintiff proceeded to file a petition under Section 72 of the Civil Practice Act. The trial court found that the petition contained no new matters not known to the plaintiff or her attorney at the time of the entry of the decree of July 26, 1963. The court accordi ngly dismissed the petition and subsequently (December 28, 1966) refused to change this order. With these actions of the trial court we whole heartedly concur.

Section 72 of the Civil Practice Act was not designed to keep alive litigation that has progressed through the normal and reasonable channels of the court system. This section does not permit the introduction of new theories of legal attack or the consideration of facts which were known to the petitioner at the time of the original hearing but were not presented to the trial judge until after the adjudication.

In the interest of judicial stability there must be an end to a case at some time. In our opinion, the plaintiff has long ago reached the end of this case and Section 72 cannot be used to breathe new life into what is obviously a legal corpse. Accordingly, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED

Davis, P. J., and Abrahamson, J. concur.

No. 65-12 and No. 65-133 (Consolidated for Opinion)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

No. 65-12

WILLIAM J. WAGNER,
Plaintiff-Appellant,

v.

MICHAEL DAVID, DAVID BUILDING CORPORATION, an Illinois Corporation, and HOME BUILDING AND LOAN ASSOCIATION, an Illinois Corporation,
Defendants-Appellees,
and

WILLIAM J. WAGNER,
Plaintiff-Appellant,

v.

MICHAEL DAVID and DAVID BUILDING CORPORATION, an Illinois Corporation, Defendants-Appellees.

Appeals from Circuit Court Kane County

* * * * * * *

No. 65-133

WILLIAM J. WAGNER on behalf of THE DAVID BUILDING CORPORATION, an Illinois Corporation,
Plaintiff-Appellant,

v.

THE DAVID BUILDING CORPORATION, an Illinois Corporation, MICHAEL DAVID a/k/a MIKE DAVID, CHARLES H. ATWELL, Trustee, ADVANCE REALTY COMPANY, an Illinois Corporation, and LASZLO KAJTSA,
Defendants-Appellees.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This opinion relates to three separate actions filed in the Circuit Court of Kane County: the two foreclosure proceedings in causes numbered 55-890 and 55-891, which were consolidated in the trial court; and a

four count chancery complaint in cause No. 150-65, to set aside certain deeds, release a certain mortgage and for an accounting. These two proceedings are before this court on appeal and were consolidated herein for opinion.

After an adverse decision in the consolidated foreclosure cases, the plaintiff appealed to this court alleging that, in addition to its decision on the merits, the trial court had erred in consolidating the two cases and in denying plaintiff's motion for a change of venue.

We concurred with the plaintiff and held that the trial court had erred in denying the requested change of venue and in ordering the consolidation. Wagner v. David, 65 Ill. App. 2d 284. The Supreme Court granted leave to appeal from our decision, and on review held that the consolidation and the denial of change of venue were proper. Wagner v. David, 35 Ill. 2d 494. Accordingly, it remanded the case to this court for a determination on the merits.

The plaintiff, William J. Wagner, herein called "Wagner" filed cause No. 55-890 and No. 55-891 against Michael David, herein called "David", and others in October of 1955. In June of 1963 Wagner filed the chancery complaint in cause No. 150-65. In cause No. 55-890 he sought to foreclose a mortgage on the David Hotel, which was given to secure a $40,000 note, and in cause No. 55-891, a mortgage on the David Apartments, which was given to secure a $20,000 note. Extensive proceedings were held before a master in chancery, who decided the issues in favor of Wagner. The trial court, on the record, sustained the exceptions to the master's reports and denied the foreclosures. The chancery complaint was dismissed on the pleadings.

It is David's theory that at the time of the execution of the instruments, he had no intention of creating mortgages; that there was neither consideration for, nor delivery of the notes and mortgages; and that the trial court was correct in its determination on the merits. Wagner contends that he

established a prima facie case for the foreclosure of the respective mortgages; that there was consideration for, and delivery of the notes and mortgages, and, that the trial court erred in denying the foreclosures.

In the foreclosure cases before us, we are not limited by the rule that we may not disturb the findings of the chancellor unless they are contrary to the manifest weight of the evidence. Uksas v. Zelensky, 21 Ill. 2d 303, 310-312 inc. (1961); Stasch v. Stasch, 355 Ill. 581, 583, 584 (1934). In Biagi v. Gregory, 19 Ill. App. 2d 534 (1959), the court at pages 540 and 541, clearly set forth our duty where the judgment is rendered contrary to the master's findings, in the following language:

> "It is well established that the rule against disturbing the findings, unless contrary to the manifest weight of the evidence, applies only where the master's report has been approved by the chancellor and in the absence of such approval the master's findings of fact does not carry the same weight as the verdict of a jury or the findings of a chancellor in cases in which the evidence has been taken by the court. Accordingly, where exceptions to a master's report have been sustained and a decree rendered contrary to the recommendations of the master, the Appellate Court is as free to pass on the question of the credibility of the witnesses and the question of the preponderance of the evidence as the lower court. 2 I. L. P. Appeal and Error, section 791, at p. 767; Hahn v. Geiger, 96 Ill. App. 104, 114 (1900). Eyer v. Read, 345 Ill. App. 293 (1952)."

While the master's findings on controverted facts do not carry the weight of a jury verdict in a suit where trial by jury is a matter of right, or of a chancellor who has heard the evidence, yet, such findings are advisory and are entitled to weight and consideration in determining the credit to be given the testimony. Uksas v. Zelensky, supra; Chambers v. Appel, 392 Ill. 294, 298 (1946). The following cases state that the master's report, while prima facie correct, is of an advisory nature only: Thatcher v. Kramer, 347 Ill. 601, 610 (1932); Mallinger v. Shapiro, 329 Ill. 629, 633, 644 (1928). Under

these pronouncements, it is evident that all of the controverted facts herein are open for consideration and determination by this court.

Time and space will not permit us to relate all of the conflicting testimony concerning the events which transpired between Wagner and David. Much of this inconsistency and contradiction might be attributed to the passage of time, yet probably more to the apparent lack of complete candor on the part of the parties. The two mortgages in question here are but a part of a larger picture; a close personal friendship that lasted over many years, then suddenly deteriorated just prior to this litigation; and a financial relationship which extended over a long period of time and included several investments.

Wagner was about twenty years younger than David. They first met in 1935 and both were then bachelors. David, who was foreign born, spoke, read and wrote English with some difficulty. In 1937, Wagner went to live with David and his mother, sister, and brother-in-law, Steve Gozner. Wagner and David thereafter lived together in various properties until 1954 when Wagner married. In 1938, they moved to a place on South Fourth Street in Aurora, Illinois, where they lived until 1941. This was the first of four pieces of property in which Wagner and David appear to have made some type of a joint financial investment.

The South Fourth Street property was acquired by David, in his name for $6,900. The purchase price consisted of a mortgage for $5,000 executed by David, with additional security of another residence, and the down payment of $1,900, which was contributed by the following persons, in the following amounts: $250 by Wagner, $600 by Steve Gozner, and the balance by David. Wagner testified that the expenses and income from the South Fourth Street property were divided equally between David, Gozner and himself. Certain monthly reports of income and expenses substantiated that the interests in the

South Fourth Street property were divided into three equal parts. From approximately 1938 to 1955, Wagner and David, according to Wagner's testimony, pooled all of their income and expenses and lived out of a common fund.

In 1941, they purchased the David Apartments for $25,000. Wagner signed the contract to purchase. This, according to David, was done so that David could avoid paying a double commission, as he had contacted two real estate salesmen with regard to this property. However, the title was taken jointly in the names of Wagner and David. A $25,000 mortgage was obtained for the acquisition of the David Apartments with both Wagner and David being obligated thereon. The $25,000 loan was secured by not only the David Apartments, but also by the Fourth Street property and another piece of property owned by David.

Wagner went into the service in 1942 and was discharged in February of 1946. He testified that during this period of time he sent his surplus money and bonds to David to put in the common fund. Certain letters in evidence confirm that this was done. About this time, David experienced difficulty with the internal revenue service because of the joint ownership of the David Apartments, and suggested by letter that Wagner convey this property to him and agreed to protect Wagner, by means of a judgment note, until he returned from the army. Wagner executed and delivered a quit-claim deed, placing the complete title to the David Apartments in David, but never received such note from David. It is also interesting that in one of his letters to Wagner in 1944, David acknowledged that he owed him $10,000 at that time. Parenthetically, it should also be observed that at the time of the trial, David conceded that he still owed Wagner $10,000.

In October of 1946, the David Hotel was purchased, in David's name, for $81,500. Again a 100% mortgage loan was obtained and the David Hotel, David Apartments and the Fourth Street property were used as security. Next in point of time, the Plano Hotel was purchased, in the name of

Wagner, for the sum of $18,500. Apparently the property was purchased in Wagner's name in order for him to obtain the benefit of a G. I. Loan in the sum of $13,000. A second mortgage was given to the vendor for $2,100, and the cash balance of the purchase price in the sum of $3,400 was derived from the sale of David's Grove Street property. The latter property was owned by David prior to any joint investments with Wagner.

Then, in September of 1947, the parties executed four mortgages and the notes secured thereby. David executed three mortgages and their accompanying notes to Wagner. These mortgages covered the three properties in which title was vested in David: The South Fourth Street property, the David Hotel and the David Apartments. Wagner executed one mortgage and note to David. That mortgage covered the Plano Hotel and the title thereto was vested in Wagner.

Wagner testified that the four mortgages were prepared to set forth the interest of David and himself in the four properties. For this purpose they used the insurance valuations. The David Apartments were valued at $40,000, and the mortgage from David to Wagner was for one-half of this sum: $20,000. The value of the David Hotel was $80,000 and the mortgage from David to Wagner was in the sum of $40,000. The Plano Hotel was valued at $25,000 and the mortgage from Wagner to David was in the sum of $12,500. The estimated value of the South Fourth Street property was $15,000, and as heretofore stated, the title thereto was in David. Wagner testified that David, Gozner and himself each had an equal one-third interest therein. As to this property, David executed a $5,000 note and mortgage to Wagner, said amount being equal to one-third of the value of the property. Each of the four notes were payable in five years and bore no interest.

It was David's testimony and contention that the notes and mortgages were not executed to represent the interest of each in the property to

which the other held title, but rather, that such instruments were executed because he (David) was going to visit behind the Iron Curtain and, in event anything happened to him, he wanted the property to go to Wagner whom he esteemed as a son. He stated that the mortgages were to serve as a will.

David testified that the respective amounts of the mortgages on the David Hotel and David Apartments were arrived at by subtracting the debts against them from their value; and that the amount of the mortgage to him on the Plano Hotel was arrived at by using the same figure as the mortgage to the savings and loan association on the property. He further testified that the mortgage on the South Fourth Street property was in the amount of $5,000, in that he believed this sum represented one-third of the value of the property. He sold this property two years later to Gozner, his brother-in-law, for an amount between $14,000 and $16,000.

It was ultimately conceded by the parties and all of the witnesses that these mortgages and notes were executed as a part of one transaction. It is also of interest that David testified that he didn't know whether he had a will at the time the notes and mortgages were executed.

The mortgages were not prepared by the parties themselves, but by David's attorney. David's attorney testified that he prepared the notes and mortgages at David's request. He recalled that they did not contemplate recording the instruments "because they were merely as evidence of obligations that the parties had with each other and this was merely in contemplation that Mr. David was about to take a trip to Europe and that there would be a more practical adjustment of the accounts between parties after Mr. David returned from Europe."

David's attorney further testified that both David and Wagner were present when all of the documents were signed. It was his recollection that he gave the documents to David after they were signed. David testified that he kept all of the documents, with the exception of the $5,000 mortgage on

the South Fourth Street property, in his strong box, and that box had a combination lock. He further testified that the papers remained in this box until early 1955 when he went on a trip; that when he returned he found that the papers and a substantial amount of money were gone; that Wagner said he had become afraid of a fire and had removed the contents of the box and had placed them in a lockbox in the bank; and that Wagner said he would return the contents, and when he didn't, he (David) fired him.

Wagner, on the other hand, testified that the mortgages and notes were given to him; that he originally kept them in a file in his room in the David Apartments; that he later removed them to the David Hotel where they were kept, along with his other personal papers, in an office which was used by both David and himself; and that the notes and mortgages remained there until about the summer of 1954--when Wagner married. Wagner further testified that he then took the notes and mortgages on the David Apartments and the David Hotel, together with his other valuables, and placed them in a metal box which he kept in his apartment; and that the mortgages remained there until he recorded them in September of 1955.

The parties had acquired a small real estate empire through their joint efforts and contributions. At the time Wagner was in the service, David acknowledged an indebtedness to Wagner. The title to the David Apartments was held jointly by them, and David persuaded Wagner to deed over his interest therein so that certain tax problems could be avoided.

The evidence is compelling that in September of 1947 the two men determined the value of the respective properties. The one who held title to a particular piece of property then gave the other a note and mortgage equal to one-half of the value. The only exception was the South Fourth Street property, which was jointly and equally owned by David, Wagner and David's brother-in-law, and that note and mortgage, executed by David, equalled

one-third of the value of the property. The testimony of David's attorney is enlightening as to the purpose and intent of these instruments. He stated that they were given as evidence of the obligations which the parties had to each other; and that there was to be a more practical adjustment after David returned from Europe.

David went to Europe the months of June and July of 1948 and upon his return he and Wagner apparently resumed the same type of financial investment program as had previously existed. The parties obtained an Illinois corporate charter in January of 1950 for the purpose of dealing in real property. The David Hotel and the David Apartments were conveyed to the corporation. Although the deed is dated January of 1950 it was not recorded until September of 1954. Recordation of the deed was precipitated by an application to a building and loan association to obtain a $12,000 loan purportedly for improvements to the David Hotel. A copy of the corporate resolution appears on a letterhead of the David Building Corporation and is certified as true and correct by William Wagner as secretary, indicating Michael David as president of the corporation. It was stipulated that the proceeds of the loan were used to liquidate a joint obligation of David and Wagner to a bank. A corporate bank account was opened in February of 1950. The signature card authorized the payment of checks on the signature of either David or Wagner. David's attorney was instrumental in the organization of the building corporation. From September of 1947 until October of 1955, the time of the filing of the foreclosure complaints, the record fails to disclose any reference to the mortgages or demands by Wagner for payment, although they were due in 1952.

Wagner was married in 1954 and the relationship of the parties apparently deteriorated and the parties came to a parting of the ways in

fall of 1955. Wagner then recorded the mortgages executed in September of 1947 and filed the foreclosure cases.

From the summation of the relationship between the parties and the chronology of events, we can only conclude that the execution of the mortgages was in conformance with the testimony of David's attorney and David, namely that they were evidence of the relative status of the parties at the time David was going to Europe and were executed to protect Wagner in the event David did not return. David did return. We surmise that the parties were of the opinion that this device, should the anticipated contingency happen, would have a considerable tax advantage and would eliminate a possible will contest. To hold otherwise, would be in our opinion, inconsistent with the factual situation of subsequent events upon David's return from behind the Iron Curtain in July of 1948.

It appears to us that the organization of the David Building Corporation was merely an effort by the parties to continue the relationship they had previously, but in a corporate form.

In Wagner's equity complaint filed in 1963, he claims to be the owner of 33 shares of the Building Corporation stock. If the mortgages of September, 1947, were in fact an adjustment of the various investments there appears to be no reason why Wagner should reappear as having an interest in the corporate property. Conversely, if the mortgages were only a temporary arrangement while David was in Europe, corporate proceedings then have significance.

For these reasons, we affirm the trial court in sustaining the exceptions to the master's report and denying the plaintiff's prayer for a foreclosure of the mortgages.

Judgment Affirmed.

The remainder of this opinion pertains to the four count chancery complaint in cause number 150-65. In this case the plaintiff appealed from the order of the trial court granting the motions of all of the defendants to dismiss the plaintiff's amended complaint. The order was granted prior to a hearing, but after consideration by the court of a myriad of pleadings, including lengthy affidavits and responses to prior pleadings, as well as briefs and arguments of counsel. The motions were apparently filed pursuant to the provisions of sections 45 and 48 of the Civil Practice Act. (Ill. Rev. Stat. 1965, ch. 110, pars. 45 and 48.). The trial court's dismissal order was based primarily on the ground that the plaintiff was guilty of laches.

First, we will consider the propriety of the order as to Counts I and II of the four count complaint. Counts I and II seek to set aside two deeds transferring title to real estate known as the David Hotel property. This property, at the time of its conveyance, was owned by the David Building Corporation, herein called "Building Corporation," in whose behalf the plaintiff, William J. Wagner, brings this suit as a shareholder. In summation of the relevant facts as reflected in the voluminous pleadings, Wagner alleged that he owned 33 of the 100 issued shares of the Building Corporation and that Michael David, one of the defendants, owned the remaining shares. However, David denied that Wagner owned any of the shares of the Building Corporation, which was incorporated in 1950. As heretofore related, Wagner and David had been close friends, but subsequently this relationship deteriorated and the present problems arose.

Wagner alleged that commencing with the year 1958, he made numerous demands to examine the books and records of the Building Corporation, but that his requests were consistently denied. He further alleged that for many years he neither received notices of the corporate meetings nor had any knowledge of the affairs of the Building Corporation; and that David had in effect treated the corporate assets and business solely as his own.

In July of 1958, the Building Corporation executed a deed conveying the David Hotel property to the defendant, Charles H. Atwell, as Trustee, herein called "Trustee Atwell.". Shortly thereafter, during the same month, Trustee Atwell conveyed the same property to the Advance Realty Company, another defendant, herein called "Advance Realty.". The two deeds were but a part of one transaction--Trustee Atwell taking title as trustee for the benefit of Advance Realty, prior to the formation of such corporation. There is nothing to indicate that these transactions were a sham. Rather, they appear to be a bona fide sale of a part of the Building Corporation properties to a third party.

The deeds were promptly filed of record and the plaintiff shortly thereafter acquired actual knowledge of the sale. Beginning in 1958 and subsequent to the date of these conveyances, Advance Realty made payments in excess of $100,000 to the Building Corporation for the land conveyed to it, as required by its contract. In the first two counts of the complaint, which was filed in June of 1963--about five years later--the plaintiff seeks to set aside the deeds to Trustee Atwell and Advance Realty.

Plaintiff contends that he was not guilty of laches in this delay. In Monroe v. Civil Service Commission of Waukegan, 55 Ill. App. 2d 354, 357 (1965), we defined what we deem to constitute laches, as follows:

> "Laches is such neglect or omission to assert a right, taken in conjunction with the lapse of time of more or less duration, and other circumstances causing prejudice to the adverse party, as will operate as a bar in a court of equity. It is thus, principally, a question of the inequity of permitting a claim to be enforced when, during the delay in asserting the right, there has been a change in condition of the subject matter or relation of the parties resulting in a disadvantage to the party against whom the claim is asserted. (Citing cases.)"

What will or will not constitute laches must be determined

by the particular facts and circumstances of each case. Korziuk v. Korziuk, 13 Ill. 2d 238, 242 (1958); Pyle v. Ferrell, 12 Ill. 2d 547, 553 (1958). In Pyle, the court points out four requisites to the application of the doctrine of laches at page 553:

> "(1) Conduct on the part of the defendant giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had notice or knowledge of defendant's conduct and the opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit, and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is held not to be barred."

When, during a delay in the institution of proceedings, there has been such a change in the relations of the parties or the subject matter that it would be inequitable to grant the relief requested, a claim is normally barred by laches, regardless of the applicable statute of limitations. Miller v. Siwicki, 8 Ill. 2d 362, 365 (1956).

The interjection of the third party into this transaction, coupled with the surrounding circumstances, compels us to find that the plaintiff was, in fact, guilty of laches. The sale by the Building Corporation to Advance Realty was regular in all respects. A detailed written agreement between the parties fully spelled out their respective rights and duties with reference to the sale. Trustee Atwell obtained from the Building Corporation affidavits and certified copies of corporate resolutions sufficient to satisfy both himself and the title company issuing the title policy on the premises, of the authority of the corporation to sell.

The amount of consideration paid by Advance Realty also indicates the regularity of the transaction. The agreement specified $124,000 as the purchase price for this downtown hotel property. Three years prior to this time, the Building Corporation granted an option to a third party to

purchase this property for $165,000, which option, however, was never exercised. The plaintiff stated that he and David executed this option on behalf of the Building Corporation. We believe that the price ultimately received for this property sufficiently approximated the earlier option price to negate any suggestion that the sale was irregular with reference to the purchase price.

To permit the plaintiff, with full knowledge of the sale of this property, to wait for five years after the date of its conveyance before seeking to set aside the sale--during which time Advance Realty occupied the property and paid in excess of $100,000 on its contract for the purchase thereof--would perpetrate a gross inequity on Advance Realty. The plaintiff's dispute is with David and the Building Corporation, and not with Trustee Atwell and Advance Realty. These purchasers during said period of time--while plaintiff sat idly by--acquired a substantial interest in the property in question as innocent third parties. By his conduct, plaintiff has forfeited his right to undo, with reference to Trustee Atwell and Advance Realty, that which has long since been consummated.

The plaintiff asserts that he had no notice of the sale and deeds to the property in question, yet the undisputed affidavit of Carl Schmitz establishes that plaintiff had actual knowledge of the sale of the land and that substantial payments were being made by Advance Realty thereon. Further, the plaintiff must be held to have had constructive notice of the sale of this land. His pleadings recite the history of a long dispute with the defendant, David, and of attempts by David to treat the Building Corporation assets as his own. If the matters set forth by plaintiff are true, they were sufficient to have put him on inquiry. The deed by the Building Corporation

was a matter of public record, and the plaintiff through such record is chargeable with laches the same as if he had actual knowledge of the facts. Miller v. Siwicki, supra, 366; Neagle v. McMullen, 334 Ill. 168, 181 (1929); Stern v. Material Service Corp., 44 Ill. App. 2d 198, 208, 209 (1963).

The plaintiff also claims that the delay in filing this suit was due to the fact that during this time he was engaged in settlement negotiations. This argument may have merit as to the claim against the Building Corporation and David, in that his dispute was with them, and any settlement discussions involved those parties. Such discussions, however, cannot be the basis for barring laches when the rights of Trustee Atwell and Advance Realty, as innocent third parties, have intervened. Even if we accept plaintiff's contention that one of the owners of stock in Advance Realty knew that Wagner claimed a part ownership in the Building Corporation and knew that he objected to the sale of the real estate, this could not alter our conclusion. The fact that Wagner was a minority shareholder and objected to the sale would neither make the sale less valid nor change the status of Advance Realty as an innocent third party, who had a right to rely on the documents it received and to be protected against a suit brought five years later to contest its title. The trial court was correct in dismissing Counts I and II of the amended complaint.

Defendants, Trustee Atwell and Advance Realty, previously filed a motion in this court asking that the appeal involving Counts I and II of the amended complaint be severed from the remainder of the case, and we took that motion with the case. In view of our decision herein, it is unnecessary to sever these Counts and the motion is, accordingly, denied.

Count III of the amended complaint, and the parties

treatment of it seems to us, somewhat bizzare. Count III asks that a certain note and mortgage of the Building Corporation be set aside or released. The brief of certain of the defendants recited that this mortgage had been released and that the corporation was no longer indebted on the note. We granted plaintiff's motion to strike this portion of the defendants' brief, as the release was not of record.

However, the question lingered on as to why we were being asked to rule on the correctness of the trial court's dismissal of this Count, which sought only to set aside the note and mortgage or have them surrendered and released if this, in fact, had already been done. During the course of oral arguments, it was admitted by both parties that the note had been paid and the mortgage had been released. Yet, counsel for the parties would not stipulate to this fact--the plaintiff because it was not of record, and the defendant because he was not the attorney in charge of the case. We abhor such pettifoggery and believe it serves no useful purpose in a legal proceeding.

While it was a fact that the payment of the note and the release of the mortgage did not appear of record, and that the parties refused to so stipulate, yet all parties concerned acknowledged such facts in their oral argument. We deem such circumstance to be a sufficient reason for our refusal to reverse the order of the trial court dismissing Count III of the amended complaint. LaSalle Nat. Bank v. City of Chicago, 3 Ill. 2d 375, 378, 379 (1954).

Plaintiff in Count IV of his amended complaint sued the Building Corporation and David, seeking an accounting of all funds received and expended from the year 1958 on. This Count likewise was dismissed as having been barred by laches. However, as to the determinations sought in this Count, the rights of third parties had not intervened. Also, commencing in 1958, and thereafter, the plaintiff made numerous requests to examine the books and records

of the Building Corporation. Other litigation was then pending between the parties. In view of these circumstances, it cannot be said that the plaintiff permitted the defendants, David, or the Building Corporation, to be lulled into a false sense of security. The plaintiff continually asserted an interest in the Building Corporation and it appears that negotiations between these parties seeking a settlement of their differences had been continuously in progress for some time. Under these facts, we cannot say that the plaintiff's delay in bringing the accounting sought under Count IV of the amended complaint was sufficient to constitute laches. We are of the opinion that the court erred in dismissing this Count on the grounds of laches.

In addition to the foreclosure proceedings heretofore decided by this court, other cases are presently pending between Wagner and David and the Building Corporation in the Circuit Court of Kane County. In view of our decision herein, we believe it to be for the best interest of the litigants, both economically and practically, that they be permitted to amend their pleadings pursuant to the provisions of the Civil Practice Act and applicable Court Rules to the end that the plaintiff may seek an accounting against David with reference to all of their business relationships, and that the defendants may file their desired answer and defenses thereto. We further believe it appropriate, in event all pending actions are not then pleaded in separate counts in one amended complaint, that said separate actions then before the court be consolidated for trial, in order that all issues pending between the parties may be adjudicated and such determination incorporated in one judgment or decree. In this manner, the numerous disputes between the parties, which appear to be related, may all be settled in one adjudication without the attendant expense of separate trials and, perhaps, appeals from several different judgments. Such is the intent and spirit of the Civil Practice Act. (Ill. Rev. Stat. 1965, Ch. 110, pars. 23, 24, 25, 33, 38, 43, 46 and 51.)

The effect of a motion to dismiss is to admit all facts well pleaded. Reel v. City of Freeport, 61 Ill. App. 2d 448, 451 (1965). Consequently, this opinion has no implications with reference to the issue of whether Wagner in fact owned 33 shares of the Building Corporation stock. Such issue, as all other issues raised in such amended pleadings as may be filed, must be determined upon the proof presented at the hearing thereon.

The order of the trial court dismissing Counts I, II and III of the amended complaint in question is affirmed; the order dismissing Count IV thereof is reversed; and the cause is remanded to the trial court for further proceedings, consistent with the views expressed herein.

AFFIRMED IN PART: REVERSED IN PART AND REMANDED WITH DIRECTIONS.

MORAN, J. concurs.

DAVIS, P. J. dissents.

* * *

MR. JUSTICE DAVIS DISSENTING:

I concur, except as hereinafter noted, in the result obtained by the majority opinion in cause number 150-65—— the four count chancery complaint to set aside certain deeds, release a certain mortgage and for an accounting. However, with deference to the law and the record, I cannot concur in that part of the opinion relating to the two foreclosure proceedings, causes numbered 55-890 and 55-891, and, consequently, dissent therefrom.

As to that part of the opinion, the majority, ex mero motu, in effect concludes that the organization of the David Building Corporation somehow supplanted the existing mortgages and notes executed by David; that Wagner's alleged ownership of 33 shares in the Building Corporation comprised his only interest in the real estate ventures of the parties; and that by the metamorphosis of the mortgages and notes into the Building Corporation shares, Wagner's mortgages were released and satisfied. I have reread the theory and conclusion of the majority and it may be because of my own obtuseness, but I can only conclude, as once did Justice Jackson in a noted dissent, "I give up. Now I realize what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" (Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 at 214 (1947).)

I find the conclusion of the majority subject to the following frailties: At no stage of this litigation did David ever assert that the mortgages could not be foreclosed because the interest of the mortgagee, as represented by the mortgages, was converted into stock ownership in the David Building Corporation. This contention was advanced by the majority without suggestion from David. He contended in his pleadings, in his testimony and argument during the trial, and before this court in his brief and argument, that the

mortgages and notes were intended only as a will; that they did not represent any interest of Wagner in the properties; and that because the mortgages were intended only as a will, there was no consideration for, or no delivery of the mortgages.

In his answer in cause number 55-890, David denied that he was indebted to Wagner and further denied that the mortgage was delivered to him. In his amended answer in cause No. 55-891, filed after the evidence was taken, to cause the pleadings to conform to the proof, David alleged that the plaintiff had no interest in the property by reason of the mortgage "for the reason that said document was never delivered to the said plaintiff and for the further reason that the said document was not based upon any valid legal consideration."

In his testimony, David consistently took the position that the mortgages were only intended as a will; that he was going on a trip behind the Iron Curtain; and that the mortgages were given for the purpose of turning his property over to Wagner in event he should not return. In his brief and argument before this court, David constantly and firmly contended that at no time did he ever intend for the mortgages to create a property interest in Wagner. In his brief David stated, "The defendant denies both delivery and consideration for the instruments * * *." In his theory of the case he asserted: "There is clear and convincing evidence to support the decision of the Chancellor in accepting the defendant's position that there was no intention on the part of

David to create mortgages, there was no delivery of and no consideration for these documents." He pursued this theory in his argument.

The majority, however, states in the court's opinion that the mortgages were an adjustment between the parties of their various investments at the time; that the organization of the corporation continued the prior relationship of the parties, but in corporate form; and concludes that the mortgages were thereby, in effect, released and replaced by the respective interests of the parties in the David Building Corporation. However, this theory was never even suggested, much less urged, by David. Time and again this court has held that it is fundamental that a judgment or decree may not stand if rendered under proofs without allegations, or under allegations without proof. In re Estate of Garrett, 81 Ill. App. 2d 141,142 (1967); Wilson v. Wilson, 56 Ill. App. 2d 187, 194 (1965); Larson v. City of Loves Park, 48 Ill. App. 2d 191,193 (1964). In this case by legal legerdemain, the majority has sustained the judgment of the trial court without either allegations, proof or supporting brief in this court.

Also, our Illinois Courts have frequently proclaimed that a litigant cannot try a case on one theory in the trial court and then present a new and different theory on appeal; and that an issue not presented to or considered by the trial court cannot be raised for the first time on review. Benson v. Isaacs, 22 Ill. 2d 606, 610 (1961); Broberg v.Mann, 66 Ill. App. 2d 134, 138 (1965). Here the majority, sua sponte,

provided the new theory without the benefit of allegations, proof, or even suggestion by the defendant in his brief or argument. The normal trial procedures are for the issues and theories, in the first instance, to be determined by the pleadings. Once the issues and the theories of the litigation are so established, then each litigant offers evidence to sustain his contentions relative to such issues and theories. If a body of law pertaining to real estate is to have stability and endure, it must have a foundation more firm than the slim reed upon which the majority bases its opinion with reference to the mortgages in question.

Here, David at no time contended that the mortgages were released, discharged, or satisfied by the subsequent organization of the corporation. The only contention he ever made was that there was no consideration for, nor delivery of, the mortgages in the first instance. He tenaciously clung to this position throughout the hearings, in the amendment of his pleadings thereafter, and in his presentation to this court. It seems to me fundamentally unfair and improper to find for the defendant in an opinion based on a theory that is supplied by the reviewing court and presented for the first time in the opinion itself.

I recognize that we need not adopt the reasoning of the court below, to sustain its judgment. In re Estate of Lynch, 65 Ill. App. 2d 162, 168 (1966). However, I can find no justification for affirming the judgment of the trial court on a theory which was presented neither to it, nor to this court on review—a theory not advanced by the defendant, but

by this court, and one which the plaintiff at no time was afforded an opportunity to contest or refute.

The Supreme Court in its consideration of the same foreclosure proceedings stated that the defendants' defense to the foreclosures was that the mortgages were intended as a will. In Wagner v. David, 35 Ill. 2d 494, 497 (1966) the court said: "The defendants contend that they (the mortgages) were to be delivered as a gift only upon the event of a contingency that did not occur. The defenses of non-delivery and failure of consideration in both cases are identical." These defenses are not rendered non-existent by disregard of them by the majority.

Further evidence that the defendant, David, did not consider the David Building Corporation as a successor to the interests of Wagner and himself in their various enterprises, and as a substitute for the mortgages, can be found in David's pleadings in cause number 150-65, which is consolidated with the foreclosure proceedings for opinion.

There, the Building Corporation and David, in a pleading, claimed that the several corporate documents filed with the Secretary of State were fraudulent, and "Michael David at all times was the owner of all the financial interest in the said David Building Corporation * * *; that one informal gathering was held during January of 1950, * * *, that no stock certificates were issued, no corporate seal was adopted, no minutes were taken of the conference, no officers were in fact elected and that at no time did Michael David, the defendant herein, relinquish any of the entire financial interest that he had in the corporation;

that the said William J. Wagner is not now and has not for many years been an officer or a director of the said David Building Corporation, nor has he ever had any financial interest in said corporation."

The above pleading of David clearly indicates his position as to the corporation. He asserts that only he has a financial interest therein. The rationale of the majority is beyond my comprehension. How can the court permit David to avoid liability under the mortgages on the theory that Wagner's interests under the mortgages were transferred into a financial interest in the corporation, when David at the same time claims that Wagner never had any interest in the corporation? How can it say that the parties in 1950, the date of the organization of the corporation and the date of the deeds of the corporation, transferred all their interests to the corporation, when David's own attorney testified these deeds were not prepared until 1954? How can it infer that the corporation was the successor to all of the business interests of Wagner and David when only two of the four properties constituting their real estate holdings were deeded to it? How can it imply any wrongdoing on the part of Wagner in not discussing the existence of the mortgages at the time of the creation of the corporation when the attorney who created the corporation was David's attorney, the one who drafted the mortgages, and when David, the one who executed the mortgages, was the president of the corporation?

Neither the pleadings, evidence, nor briefs herein even suggest that David ever considered that Wagner had an

interest in the corporation which was based on his interest in the real estate as represented by the mortgages. David did not contend—in fact he never even suggested—that the parties agreed to satisfy the mortgages by the creation of the corporation. The only defenses which David asserted to the mortgages were failure of consideration and non delivery. We should consider these cases on the issues which the parties raised in the trial court and asserted before us: namely, were these valid mortgages, or were they intended to take the place of a will and did they thus lack consideration and delivery?

As to the position of David, there is one fact which he never explained and which I am unable to understand—that is: if it were David's purpose to execute these three respective notes and mortgages in lieu of a will, solely to protect Wagner and to see that all of his property went to Wagner in event of his death on his trip behind the Iron Curtain, then why did Wagner also contemporaneously execute a mortgage and note to David on the one piece of property in which the title was vested in Wagner? This act is totally inconsistent with the rationale of David's version of the purpose of these instruments. It was ultimately conceded by the parties and all of the witnesses that these mortgages and notes were executed as a part of one transaction.

It is also of interest that David testified that he didn't know whether he had a will at the time the notes and mortgages were executed. If David were concerned about protecting Wagner in the event of death, it seems unusual that it would be necessary for Wagner and himself to obtain valuations of the properties

and for David to then cause these notes and mortgages to be prepared without first determining whether he then had a will and, if so, what it provided. Also, it seems somewhat odd that he chose to accomplish the end result of protecting Wagner, in event of his death, by such belabored and circuitous devices, rather than by the simple procedure of making a will, if he didn't already have one.

The mortgages were not prepared by the parties themselves, but by David's attorney. I cannot but believe that David's attorney would have prepared a will, rather than a series of notes and mortgages, if David's purpose had been as he suggested. Also, if David had suggested to his attorney that he wanted all of his interests in the properties in question to go to Wagner if he did not return from his trip behind the Iron Curtain, then it would have been more logical for his attorney to prepare deeds and deliver them in escrow, rather than notes and mortgages, to accomplish this purpose.

David's attorney testified that he prepared the notes and mortgages at David's request. He recalled that they did not contemplate recording the instruments "because they were merely as evidence of obligations that the parties had with each other and this was merely in contemplation that Mr. David was about to take a trip to Europe and that there would be a more practical adjustment of the accounts between parties after Mr. David returned from Europe." His testimony is consistent with the theory advanced by Wagner, that is: that the mortgages actually were evidences of

the obligations of the parties to each other. His testimony contradicts that of his client to the effect that the mortgages were intended only to take the place of a will in the event of his death.

David's attorney testified that both David and Wagner were present when all of the documents were signed. It was his recollection that he gave the documents to David after they were signed. David testified that he kept all of the documents, with the exception of the $5,000 mortgage on the South Fourth Street property, in his strong box, and that the box had a combination lock. He further testified that the papers remained in this box until early 1955 when he went on a trip; that when he returned he found that the papers and a substantial amount of money were gone; that Wagner said he had become afraid of a fire and had removed the contents of the box and had placed them in a lockbox in the bank; and that Wagner said he would return the contents, and when he didn't, he (David) fired him.

Wagner, on the other hand, testified that the mortgages and notes were given to him; that he originally kept them in a file in his room in the David Apartments; that he later removed them to the David Hotel where they were kept, along with his other personal papers, in an office which was used by both David and himself; and that the notes and mortgages remained there until about the summer of 1954—when Wagner married. Wagner further testified that he then took the notes and mortgages on the David Apartments and David Hotel, together with his other

valuables, and placed them in a metal box which he kept in his apartment; and that the mortgages remained there until he recorded them in September of 1955.

There is much other evidence pertaining to the execution, delivery, consideration, and the nature and purpose of the mortgages in question. A number of witnesses testified. However, the bulk of the testimony was offered for the purpose of impeaching the prior testimony of other witnesses. It would serve no purpose, other than that of obfuscation, to relate all of the conflicting and inconsistent incidents related in the testimony. I believe that these facts and the summary of the evidence contained in the majority opinion is sufficient for an understanding of the factual dispute presented.

Also, it seems that the majority opinion overlooks several legal principles applicable to the mortgages and notes which are determinative of the rights of the parties under the issues presented by the pleadings, proof, and briefs and argument filed herein.

The execution of the notes and mortgages is undisputed. The presumption is that the mortgages are exactly what they purport to be— security for the notes which evidence an indebtedness secured thereby. Miller v. Mandel, 174 Ill. App. 166, 171 (1912), aff'd 259 Ill. 314 (1913). The proof of the execution of the notes and mortgages, possession sufficient to permit the mortgagee to record, the recording of the mortgages and non-payment of the debt evidenced by the notes were sufficient to establish prima facie cases for foreclosure. Stalzer v. Blue, 312 Ill. App. 563, 569, 570 (1942); Miller v. Mandel, supra. It was encumbent upon defendant to then

present some affirmative matter of defense such as total failure of consideration, non-delivery or conditional delivery and to prove such defense by clear and convincing evidence. Foreman Trust and Sav. Bank v. Cohn, 342 Ill. 280, 287 (1931); Niehaus v. Niehaus, 2 Ill. App. 2d 434, 442 (1954); Stalzer v. Blue, supra, Miller v. Mandel, supra.

The evidence confirmed that the notes and mortgages were exactly what they purported to be and were given for consideration. The parties had acquired a small real estate empire through their joint efforts and contributions. At the time Wagner was in the service, David acknowledged an indebtedness to him in the sum of $10,000, and at the time of the trial he conceded that he still owed Wagner this amount. While Wagner was in the army, the title to the David Apartments was held jointly by them, and David persuaded Wagner to deed over his interest therein so that certain tax problems could be avoided. This was in 1944 and David promised a note to secure Wagner for such deed. The note was not forthcoming until September of 1947, when the mortgages and notes were executed.

The evidence is compelling that in September of 1947, the two men determined the value of the respective properties. The one who held title to a particular piece of property then gave the other a note and mortgage equal to one-half the value. The only exception was the South Fourth Street property, which was jointly and equally owned by David, Wagner and David's brother-in-law, and that note and mortgage, executed by David, equalled one-third of the value of the property.

The testimony of David's attorney is enlightening as to the purpose and intent of these instruments. He stated that they were given as evidence of the obligations which the parties had to each other; and that there was to be a more practical adjustment after David returned from Europe. But, the later "more practical adjustment" never materialized, and the notes and mortgages remained as the adjustment of the obligations of each to the other. The voluntary settlement transaction abounds with consideration.

David also contends that there was no delivery of the notes and mortgages to Wagner, and absent such delivery, Wagner cannot foreclose the mortgages. As to the issue of delivery or the failure thereof, the rules applicable to deeds and conveyances are, generally, equally applicable to mortgages and securities for an indebtedness. Chicago Title & Trust Co. v. Wallace, 250 Ill. App. 293, 299 (1928).

There must be a delivery of a deed or mortgage to make it effective. Maciaszek v. Maciaszek, 21 Ill. 2d 542, 546 (1961); Hathaway v. Cook, 258 Ill. 92, 96 (1913). The delivery may be actual or symbolic. It depends not on a manual transfer of the document, but rather, on the intention of the grantor as manifested by acts, words or other circumstances surrounding the transaction. Maciaszek v. Maciaszek, supra; Berigan v. Berigan, 413 Ill. 204, 215 (1952); Creighton v. Elgin, 395 Ill. 87, 96 (1946).

The execution and recording of the document raises a presumption of delivery, and while this presumption may be over-

come, it may be overcome only by clear and convincing evidence. Maciaszek v. Maciaszek, supra; McGhee v. Forrester, 15 Ill. 2d 162, 165 (1958); Niehaus v. Niehaus, supra, 442; Creighton v.Elgin, supra.

Other facts and circumstances in these cases militate against the defense that there was no delivery of the notes and mortgages: such instruments contained no language indicating that any conditions or limitations were inherent in them; and the testimony of David's attorney indicated that the notes and mortgages were executed to attain a voluntary settlement or adjustment of David's and Wagner's property interests. The presumption of delivery in cases of voluntary settlement is greater than in cases of ordinary transfers. McGhee v.Forrester, supra. At this time there was a close relationship of mutual trust between the parties, akin to that of father and son. Consequently, a manual transfer of the mortgages and notes was not essential to their valid delivery. Berigan v. Berigan, supra, 217; Hoyt v. Northup, 256 Ill.604, 608, 609 (1912).

The presumption raised by the execution and recording favor Wagner's contention, and David has not presented the clear and convincing evidence necessary to overcome it. True, the mortgages were not recorded until 1955, some eight years after their execution. However, the explanation for this is apparent. The parties intended that the documents would evidence the obligation of each to the other, and it was contemplated that a more complete adjustment would be made upon David's return from Europe. This circumstance, according to the testimony of David's attorney, was the reason the documents were not recorded.

Also, at this time, David and Wagner had the utmost of trust and confidence in each other. It was significantly important

to them to keep these properties free from the burden of their respective encumbrances in order that they could use them as security in borrowing additional funds from third parties in connection with the acquisition of other properties; and such procedure had been their mode of operation. Until their relationship became strained and bitter, neither had any reason to record the evidence of his interest to protect himself against the other.

The delay in the recording of the mortgages and notes does not indicate that Wagner lacked control or possession of them during the interim. Under the circumstances that existed, the delay in the recording was to be expected. In Creighton v.Elgin, supra, the recording of a deed in 1936, which was executed in 1918 by a grantor who had died in 1920, was still found to raise a presumption of delivery. The factual situation before us presents a much more compelling case for the presumption.

Considered in its entirety, the evidence appears to substantiate only Wagner's version of the purpose and intent which motivated the execution of the notes and mortgages. Under the evidence, it is difficult to accept the contention that they were intended only to take the place of a will in the event David did not return from Europe. Accordingly, I conclude that it was the intent of the grantor or mortgagor executing each of the four notes and mortgages, that the other receive delivery of each note and mortgage at the time it was executed.

Insofar as the physical possession of the documents is concerned, I am of the opinion they were kept—as testified to—by Wagner. Even if David's version of where the documents were

kept is adopted, it would not alter my determination. Under his version, the notes and mortgages were kept in a strong-box with a combination lock to which Wagner also had access. The establishment of delivery is not negated by the fact that the documents were placed in a container to which both parties had access. The fact of delivery is strengthened by the circumstance that Wagner had at least joint possession and control of the notes and mortgages. Layton v. Layton, 5 Ill. 2d 506 (1955); Berigan v. Berigan, supra 217. Under the facts herein, and with deference to the purpose for which I believe these instruments were executed, I can only find that there was delivery of the notes and mortgages to the mortgagees named therein.

The foregoing fully answers the issues presented to this court. As between themselves, the notes and mortgages were given for consideration and were delivered. They represented the respective obligations of each to the other at that time, based upon the current valuation of each of the respective properties which they owned. Under the evidence, it seems probable that it was intended that a "more practical adjustment of accounts" would be worked out later, but this never came about. Failing this, however, Wagner had his notes and mortgages upon which he could institute foreclosures after default in the terms thereof.

It is my opinion that the trial court erred in sustaining the exceptions to the Master's reports, in reversing

his findings in favor of the plaintiff and in refusing to enter a decree for the foreclosure of each of said mortgages. I would reverse the trial court and remand the consolidated foreclosure cases with directions to overrule the exceptions to the Master's reports and to enter a decree awarding the respective foreclosures sought. However, the decree of foreclosure for each of said mortgages should be for the principal sum of each of said mortgage notes, plus reasonable attorneys' fees and costs, and should include interest only for that period of time after the date when Wagner ceased to share in the rents, issues and profits from the David Hotel and David Apartment properties. In other words, interest on said notes after maturity would be suspended during the period in which Wagner shared in the rents, issues and profits from said properties. 23 I.L.P. (Interest) section 64, page 31; 47 C.J.S. (Interest) section 48, page 61.

Inasmuch as these notes and mortgages were given by the parties to represent the respective interests of each in the properties in question, I do not intend that the foreclosure decrees should bar Wagner from proceeding in the pending action wherein he seeks an accounting in other matters. However, the respective amounts found due in the foreclosure decrees would include interest after the due date of said respective notes, with the exception of the period of time thereafter in which Wagner shared in the rents, issues and profits from said properties. Consequently, such principal sum, attorneys' fees,

interest and costs, as well as the rents, issues and profits which Wagner received, should not be included in the accounting sought by Wagner in Count IV of cause No. 150-65. Thus, as to the consolidated foreclosure proceedings, I would reverse and remand with directions to enter decrees of foreclosure, consistent with the views expressed herein.

As to cause No.150-65, I agree generally with the conclusions of the majority. They affirm the order of the trial court which dismissed Counts I, II and III of the amended complaint in question and reverse the order dismissing Count IV. Thus, this reverses the dismissal order as to both David and the Building Corporation. Elsewhere, however, the majority refers to the right of plaintiff to seek an accounting against David with reference to all of their business relationships. Such language creates doubt as to whether the majority intend for such accounting to include the business transactions between the plaintiff and the Building Corporation. So that there may be no misunderstanding, I would expressly hold that plaintiff's right to an accounting extends to all of his business relationships with David and the Building Corporation, or its successors, excepting only those matters embraced by the consolidated foreclosure decrees, which I believe should be entered in causes numbered 55-890 and 55-891.

The determinations which I have reached in these cases, which were consolidated for opinion, are adequately supported by the evidence of record. If followed, I believe they would achieve a fair and equitable adjustment of the rights of the parties pursuant to their intent and purposes, as ascertained from the evidence, and in accordance with the established law pertaining to the notes and mortgages which they executed.

No. 67-12

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MEADOWDALE SHOPPING CENTER, INC., an Illinois corporation,	)	
Plaintiff-Appellant,	)	Appeal Circuit Court Kane County
MEADOWDALE LANES, INC., an Illinois corporation; MEADOWDALE LANES, an Illinois Limited Partnership; JOSEPH J. ABBELL, Individually and as General Partner of Meadowdale Lanes, an Illinois Limited Partnership, and LEONARD LAMENSDORF, Individually and as a General Partner of Meadowdale Lanes, an Illinois Limited Partnership,	)	
Defendants-Appellees.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This is an appeal from the Circuit Court of Kane County, Illinois. This action was originally commenced by Meadowdale Shopping Center, Inc. (hereinafter referred to as 'Landlord') against Meadowdale Lanes, Inc., an Illinois corporation, Meadowdale Lanes, a limited partnership, Joseph J. Abbelland Leonard Lamensdorf, both individually and as general partners in said limited partnership (hereinafter referred to as 'Tenant'). The Landlord sued for an accounting of unpaid rents under the Tenant's lease. This lease agreement was dated September 30, 1960, and had been assigned to this particular Tenant under date of August 15, 1961. Tenant counter-claimed seeking to enjoin Landlord from constructing a building on an area owned by Landlord and used for parking in the shopping center, located to the

southwest and in close proximity to the Tenant's premises. The Meadowdale Shopping Center consists of approximately 45 acres of land at the intersection of Meadowdale Drive and Route 25, approximately 7 miles north of the City of Elgin in Kane County, Illinois. Title to the property rests in the Landlord. The shopping center has been in operation and gradual stages of development since 1957; it consists of a group of buildings owned by the Landlord and leased to various tenants for use as retail stores offering for sale diverse lines of goods and services.

Upon the execution of the lease between Landlord and Tenant herein, there was attached to said lease as Exhibit "A" a plot plan which showed, among other things, the location of the Tenant's bowling alleys, the location of various stores already constructed or planned, including departments stores, a drug store and other commercial establishments. The plot plan also showed the location of future stores, including a motion picture theatre which was to be located immediately north of the bowling alley. Surrounding the existing and proposed structures was a large area of parking space marked out in considerable detail showing the direction of traffic, detailed description of the parking facilities, the location of stop signs and 'no parking' signs, as well as other common ways. The plot plan was drawn to scale and Exhibit "A" contained the scale. On or about March 1, 1966, the Village of Carpentersville, in which village the shopping center is located, issued a permit to the shopping center for construction of a theatre in the southeast corner of the shopping center in close proximity and adjacent to Tenant's bowling alleys. The pertinent and relevant portions of the lease are as follows:

> "1. The legal description of the site in the Meadowdale Shopping Center in which Demised Premises are located is described in Exhibit "B" which is attached hereto and made a part hereof."

"5. Landlord does hereby grant to Tenant during the term of this lease, and any extensions or renewals hereof, the right to the uninterrupted use of all parking driving and walking areas in said shopping center, with rights of ingress and egress to and from the Demised Premises, and for free parking; said areas to be used by Tenant, its invitees, customers and the general public, together with and subject to the same rights granted from time to time by Landlord to other tenants and customers of said shopping center. Such areas shall not be fenced or otherwise obstructed, but this shall not prevent Landlord from installing curbing and other traffic control devices in the parking areas pursuant to a program of traffic control for the shopping center."

"5. 1. During the entire lease term and any extensions or renewals, Landlord shall maintain, repair, clean, light, mark, and remove snow and ice from the parking, driving and service areas shown on Exhibit "A", and shall maintain and repair the underground plumbing, utility lines and drain sewers servicing such areas. Landlord shall also maintain the shrubbery and planting area, and operate, maintain and repair the undercanopy lighting system. Tenant shall pay quarter-annually to Landlord its proportionate share of expenses incurred by Landlord in repairing, striping and re-striping and lighting the common facilities as well as the cost of keeping the same free and clear of ice, snow and debris. The share to be paid by Tenant shall be assessed according to the ratio that the number of square feet of Tenant's building bears to the number of square feet in the entire shopping center as now or hereafter constituted. The share to be paid by Tenant, in any event, shall not exceed fifteen cents (15¢) per square foot per annum of the building occupied by Tenant."

"5. 2. Should the Landlord at any time during the term of this lease, or any extension thereof, erect any building in addition to those depicted on Exhibit "A" attached hereto, Landlord will at such time provide and construct any additional common facilities as will be required to provide parking area in a ratio of not less than three (3) square feet of parking area to one (1) square foot of ground floor building area. The provisions of paragraphs 5 and 5. 1 hereof shall apply to such additional common facilities with the same force and effect as to the common facilities."

As stated, attached to the lease as Exhibit "A" was a plot plan showing the location of the various components of the shopping center, including the demised premises, that is, the bowling lanes, as well as the location of a future theatre

to the north of the bowling lanes. Also attached to the lease as Exhibit "B" is a plat of survey giving the legal description of the demised premises and locating it with regard to certain existing and proposed buildings in the southwest corner of the shopping center, all as shown in greater detail on Exhibit "A".

A motion for temporary injunction by Tenant was filed and denied. A hearing on Tenant's counter-claim was specially set for trial prior to a hearing on Landlord's complaint for accounting. After hearing, the trial court entered an injunction against the Landlord and in favor of Tenant, enjoining construction of a building on the areas purportedly reserved for parking in the shopping center, as shown on Exhibit "A" to the lease.

It is the position of Tenant that by the lease and its Exhibits "A" and "B", he was granted an easement in the area designated in Exhibit "A" as parking area and that the Landlord may not construct additional buildings in such designated parking areas. It is the position of the Landlord that he may construct additional buildings now and in the future in any of the areas shown on Exhibit "A", as long as he complies with the terms of Paragraph 5.2 of the lease and somewhere or somehow provides additional parking in the ratio of 3 square feet of parking to 1 square foot of ground construction. Landlord argues that Exhibit "A" was attached to the lease merely for the purpose of defining the location of the bowling lane building to be erected under the terms of the proposed lease, vis-a-vis, the rest of the shopping center, and for no other purpose and in no way was intended to indicate where the parking area would be or to give to the Tenant any right in the parking areas shown on said Exhibit. It is interesting to note that Exhibit "B", in addition to containing the legal description of the premises, also located the premises vis-a-vis those portions of the shopping center existing and proposed in the immediate vicinity of the site of the bowling lanes. Landlord cites many cases setting

forth the rights of the Landlord in developing his property as he sees fit, but, of course, admits that such right may, by voluntary agreement with the Tenant or other parties, be restricted and that he may limit his right to construct buildings on his own property as he sees fit.

Both parties discuss in great detail the decision in The Fair v. Evergreen Park Shopping Plaza, 4 Ill. App. 2d 454 (1955). Both sides agree that the decision in that case is correct. Each argues, however, that if properly applied to the facts before us, each should prevail. Obviously, such a result cannot ensue. In the Evergreen Plaza case, The Fair Store, an Illinois corporation, and H. C. Lytton & Co. had signed leases with the defendant, to which leases were incorporated site plans similar to the Exhibit "A" before us. In The Fair lease, the site plan was specific as to the dimensions of the parking area and a common mall. In the Lytton lease the site plan was "approximately" as shown with respect to the parking area and a common mall. Subsequent to the execution of The Fair and Lytton leases, another tenant, Carson Pirie Scott & Company, started construction of a bay that would have intruded into the mall some 5 feet by 20 feet. Lytton and The Fair claimed that the bay proposed by Carsons reduced the width of the mall and gave Carsons a competitive advantage over them in the retailing and display of its merchandise and that the resulting damages from this retail advantage were impossible of actual compensation, and therefore, they sought injunctive relief. We are not unmindful of the extraordinary relief a party seeks when requesting a court to issue an injunction. As was said in Cleveland v. Martin, 218 Ill. 73, 86-87:

> "Substantial and positive injury must always be made to appear to the satisfaction of a court of equity before it will grant an injunction, and acts which, though irregular and unauthorized, can have no injurious result, constitute no ground for the relief . . . An injunction, being the 'strong arm of equity,' should never be granted except in a clear

> case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity"

In affirming the mandatory injunction directing Landlord and Tenant (Carsons) to remove the extension constructed by Carsons in the common mall, the Court in the Evergreen Plaza case stated at pages 464 and 465:

> "Every tenant in the Plaza except Walgreen and Kroger is entirely surrounded by property owned by Evergreen and has no means of ingress or egress for itself, its employees, agents, customers and invitees except upon and over property owned by Evergreen. The right of ingress and egress upon and over the property of Evergreen is essential to the full beneficial use and enjoyment of the demised premises--the part occupied by the stores of the respective tenants. It is an easement appurtenant to the demised premises and passes by a lease without any additional words. 32 Am. Jur., Landlord and Tenant, sec. 169.
>
> The easements acquired by plaintiffs were not left to implications of law. They are specifically granted and defined in the leases to the respective plaintiffs. The language of The Fair lease creating the interest which is the subject matter of this litigation is as follows:
>
> > 'Landlord agrees to construct and maintain curb cuts and driveways and an area for parking and mall to connect with the demised premises (all hereinafter called 'parking area') in said Evergreen Park Shopping Plaza, to be located in accordance with . . .(site plan revised February 16, 1951, hereinbefore referred to), which said site plan is incorporated herein by reference. Landlord hereby leases and demises to tenant the parking area hereinabove described, and such parking areas as may be added thereto from time to time hereafter . . . for the term of this lease and any renewal term for use by tenant, its employees, agents and invitees in common, with use by landlord and by all tenants in said Evergreen Park Shopping Plaza, their employees, agents, customers and invitees . .' (Emphasis added.)
>
> Landlord further agreed to manage and operate the parking area during the term of the lease and any renewal term, but not as agent of tenant; to keep tenant insured against all statutory and common-law liabilities for damages on account of injuries, including death, sustained by any person or persons while within the parking area or other areas immediately adjacent thereto, or on account of damages to property. Tenant agreed to pay on demand, 'as further rent,'

> its proportionate share of the actual cost to the landlord, but not to exceed $25,000 per lease year, for operating, lighting, cleaning, removing snow, policing or otherwise properly maintaining the parking area."

The right of ingress and egress upon and over the property of the Landlord here is also essential "to the full beneficial use and enjoyment of the demised premises" by this Tenant. To accept Landlord's theory of the case would in our opinion require us to ignore the provisions of Paragraph 5 of the lease. The provisions of Section 5.2 of the lease do not in our view permit the construction of additional buildings at any point within the shopping center merely by making provision somewhere for additional parking on a 3 for 1 square foot basis. Such obviously was not the intent of the parties. Where there is any doubt in the language of a lease it should be construed most strongly against the lessor. Book Prod. Industries v. Blue Star Auto Stores, 33 Ill. App. 2d 22, 31.

Finally, Landlord complains that the decree in the lower court goes too far in that it gives the Tenant the right to block any future construction by the Landlord on any portion of his land. An examination of Exhibit "A" is sufficient to refute that argument. In that exhibit there are several areas marked out for proposed construction of stores, future parking and additional uses, all of which could under the terms of the decree be used by the Landlord for construction he presently contemplates. In any event, the enforcement of the decree rests with the court below and we must assume it will give full consideration to the rights of the parties and will be enforced fairly and reasonably.

For the reasons above stated, the decree of injunction below is hereby affirmed.

JUDGMENT AFFIRMED.

DAVIS, P. J. and MORAN, J. concur.

89 I.A.2 284

No. 67-86 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

IN THE MATTER OF ORDINANCE NO. 491, STANDING AS A PETITION, ANNEXING CERTAIN TERRITORY TO THE CITY OF LOVES PARK, ILLINOIS,	)	
(NORTH PARK FIRE PROTECTION DISTRICT ROCKFORD, ILLINOIS, A PUBLIC CORPORATION, OBJECTOR,	)	Appeal from Circuit Court Winnebago County
Appellant)	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from two orders of the Circuit Court of Winnebago County.

On October 10, 1966, the City Council of Loves Park, Illinois, passed an Ordinance No. 491, annexing certain property to the City of Loves Park. On October 17, 1966, the City filed its petition for annexation pursuant to Chapter 24, Sections 7-1-1 through 7-1-10, Ill. Rev. Stat. (1965) praying for a referendum of electors of the area. On November 2, 1966, the North Park Fire Protection District, as an interested party, filed objections to the petition and ordinance, alleging that the territory described in the ordinance is not contiguous to the City of Loves Park. The court, after hearing, found the petition and ordinance to be valid and ordered the question of annexation be submitted to the electors. Subsequent to a majority of the electors voting in favor of annexation, a final order of annexation was entered by the trial court. It is from these two orders that the Fire District has appealed.

In late 1959 and early 1960, the City of Loves Park passed four ordinances annexing four separate pieces of land. In a Quo Warranto proceeding in the Circuit Court of Winnebago County, Case No. 73201, the validity of three of these parcels was challenged. On July 20, 1960, the trial court in that proceeding entered a final judgment declaring the four parcels to have been legally and validly annexed to the City. Subsequently, in People v. City of Loves Park, Illinois, 59 Ill. App. 2d 297, a Quo Warranto proceeding was brought to oust defendant City from exercising governmental and municipal authority over certain territory consisting of fourteen separate parcels of land, including the four parcels that had been the subject matter of Case No. 73201. As to these four parcels, this court held that the judgment of July 30, 1960, was res judicata, as to the validity of their annexation. As to the other ten parcels, they were found to be "strip" or "corridor" annexation and as such were not contiguous within the meaning of the Municipal Code and the annexation was therefore prohibited. The tract of land in this proceeding has a common boundary with the City of Loves Park of some 831 feet. The tract is adjacent to the four parcels which were the subject matter of the proceeding in Case No. 73201. This tract also includes some of the parcels of land previously sought to be annexed.

The Fire District contends that notwithstanding our decision in People v. Loves Park, supra, that the validity of the annexation of the four parcels in Case No. 73201 is res judicata, the lack of contiguity of those parcels is material to a determination of the contiguity of the land here annexed. The Fire District further contends that the present annexation is designed to bring the city limits closer to the subdivision

known as Oak Crest and that the city intends to annex Oak Crest eventually. It is urged that by the time Loves Park completes its annexation program, its boundaries will resemble the shape of a "dumbbell", and that the two major sections joined by a strip will not have the unity of city facilities. Our Supreme Court in Western Nat. Bank v. Vil. of Kildeer, 19 Ill. 2d 342, 351, stated:

> "While the boundaries of the village of Kildeer are extremely irregular, this in itself is not a fatal defect. Under the provisions of the School Code where compactness as well as contiguity is a requisite, the courts of this State have adopted a liberal attitude on this question."

In Spaulding School Dist. v. Waukegan, 18 Ill. 2d 526, 528, the Supreme Court again held:

> "At the outset we must recognize that the legislature, and it alone, has the power to permit or require the alteration of municipal boundaries by annexation or otherwise. (citation omitted) Our only duty is to construe the ordinance and the applicable statutes to determine whether the city has complied with the annexation procedure established by the legislature. At the time of the adoption of this ordinance, the legislature had provided for annexation by a municipality, by ordinance and referendum, of 'Any territory which is not within the corporate limits of any municipality but which is contiguous to a municipality.' Ill. Rev. Stat. 1957. chap. 24, par. 7-1."

We will not set aside the previous annexations in order to render the territory sought to be annexed in this proceeding non-contiguous, People v. City of Loves Park, supra, nor will we invalidate the present annexation because of some fear that some future annexation may be predicated upon it. The validity of future annexations will be passed upon as they are presented to the Court.

The defendant contends that between the annexed area and the City there is not the necessary unity of facilities. In Peo. ex rel. So. Barrington, v. Hoffman, 30 Ill. 2d 385 at 387, the Court decided:

> "The fundamental notion of a municipal corporation is that of unity and continuity, not separated or segregated area; a group of people gathered together in a single mass. This necessity for unity of purpose and facilities forms the very basis for the requirement of contiguity."

The record before us does not show that the City of Loves Park will not afford to the annexed area police and fire protection, garbage collection, or that it will fail to perform any other of the municipal functions. On this record we cannot hold that there is such a lack of unity of facilities as to render the annexed area not contiguous. In looking at the territory before us, we believe the trial court correctly ruled that it was contiguous to the existing boundaries of the City of Loves Park, Illinois.

For the foregoing reasons we think the trial court was correct in overruling the objections of the Fire District and its judgment should be affirmed.

JUDGMENT AFFIRMED.

DAVIS, P. J. and MORAN, J. concur.

No. 67-1

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967.

Abstract

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

HARRY STROUD,
Defendant-Appellant.

Appeal from the Circuit Court of Whiteside County, Illinois.

Honorable George O. Hebel, Judge Presiding.

ALLOY, J.

Defendant Harry Stroud appeals to this Court from a conviction for attempted burglary as a result of which he was sentenced to a term of from two to ten years in the Illinois Penitentiary. On appeal in this Court he contends that the indictment was insufficient to sustain the conviction, that the evidence was insufficient to prove defendant's guilt beyond a reasonable doubt and that the jury was not properly instructed.

The record discloses that two Rock Falls police officers on their routine patrol checked a gas station known as "Ed's Gas for Less" about 11:30 P.M. Everything seemed to be in order. Later, about 1:45 A.M. they again checked the premises and found a window in the rear of the gas station broken. There was blood on the glass in the window, blood on a piece of glass inside the window and blood in great amounts on the ground.

The officers then went to the hospital at Sterling, Illinois, where they found the defendant Harry Stroud being treated in the emergency room by a doctor. He was semi-conscious. Defendant's injuries consisted of a very deep laceration on the right wrist involving deep and superficial flexor tendons. The officers then returned to the service station and trailed blood from the service station window in an easterly direction about a block from the spot where they found a large pool of blood soaked into the ground and observed tire tracks apparently made by winter-type tires. They discovered an automobile belonging to a brother of a Jackie Jones which had similar tires on it. There were blood stains under the rear floor mat in the back seat of the car and blood under the floor mat. Jackie Jones was called as a witness and after her refusal to testify she was granted immunity and was called as a court witness. She testified that she left a tavern in Rock Falls with the defendant in her brother's car about 11:30 P. M.; that defendant drove the car and they drove around for a half hour or so when she passed out or fell asleep. When she woke up defendant was getting into the back of the car and was bleeding from a cut on his hand or arm. She thereafter drove the car and took defendant to the hospital. Defendant had stated to Jackie Jones that he got hurt in a fight at the Latin American Club. Defendant, in the Circuit Court of Whiteside County at the same time as he was tried on the indictment before us, was also tried on a burglary charge involving a restaurant in the same building as the gas station which was the subject of the attempted burglary charge. There was a directed verdict of not guilty on the burglary charge. There was evidence that the restaurant which was located in the same building as the gas station under consideration had been entered and "rifled".

Taken in its aspect most favorable to the prosecution, all that the evidence shows is that defendant broke a window in a gas station in question and in the process cut his arm. There is no evidence that the defendant made any attempt to enter the building nor any evidence of any intention that he may have had at the time he broke the window. The evidence shows that defendant was intoxicated at the time and that the witness Jackie Jones who had been with him during the evening, either fell asleep or passed out from the effects of alcohol. Witness Jackie Jones stated that defendant got drunk even faster than she did.

While the circumstances arouse a suspicion as to defendant's purpose and conduct in the area, it fell short of establishing defendant's guilt beyond a reasonable doubt (Illinois Law and Practice, Criminal Law §301). The breaking of the window would not necessarily and indispensably imply a design to commit burglary. In view of the record, we have no alternative but to reverse this cause and the judgment entered in the Circuit Court of Whiteside County.

Judgment reversed.

Stouder, P. J. and Culbertson, J., concur.

NO. 67-27

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JAMES L. CURRIE, et al., Plaintiff-Appellant, vs. ETALO DAMINATO, Defendant, and A.H. SOLLINGER CONSTRUCTION CO., INC., Garnishee-Defendant-Appellee.	)	Appeal from the Circuit Court of DuPage County, Illinois.

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT:

This appeal involves a review of a trial court order vacating a final judgment against a garnishee-defendant pursuant to Section 72 of the Civil Practice Act. (Ill. Rev. Stat. 1965, Ch. 110, Sec. 72.) The issue presented is whether the petition of the garnishee-defendant establishes diligence and a meritorious defense sufficient to justify a vacation of the judgment under that section.

On January 18, 1966, a conditional judgment by default for $20,977.25 was entered against the garnishee-defendant (herein referred to as defendant). On February 11, 1966, the defendant filed its appearance and answers to the garnishment interrogatories by alleging that it held $12,926.20 belonging to the

judgment debtor, but that these funds were "subject to liens of subcontractors in that amount." On March 10, after the foregoing answers were filed, defendant was served with an alias summons to appear on or prior to March 26, 1966, and show cause why the conditional judgment should not be confirmed. The defendant failed to respond to this alias summons.

Pursuant to notice, plaintiff moved for a hearing on April 12, 1966, on defendant's answers to the interrogatories. Defendant failed to appear on said date, whereupon an order was entered striking defendant's answers and requiring the defendant to file an amended answer to the interrogatories within thirty days. The amended answer was not filed, and on July 25, 1966, defendant was served with a notice that plaintiff would appear in court on August 3, 1966, and present a motion attached thereto. (Although this motion is not included in the record, it appears to have been a motion to confirm the conditional judgment.)

On August 3, presumably in response to the notice served upon it, the defendant filed a motion requesting additional time within which to file its amended answer. The record discloses that plaintiff's attorney was not actually present in court until after this motion was presented; in any event, an order was entered giving defendant "to the 23rd day of August, A.D. 1966 to file its additional or amended Answer herein." It is significant that this order did not set August 23 as a hearing date for plaintiff's motion to confirm the conditional judgment, which motion was apparently not even filed.

Plaintiff's attorney appeared in court on August 23 and, when no one appeared on behalf of defendant, was successful in having the court enter an order confirming the conditional judgment in the amount of $20,977.25. Nothing further transpired until November 17, 1966, when plaintiff commenced further garnishment proceedings against the defendant's bank account.

On the following day the defendant reacted by serving notice of its petition under Section 72 to vacate the judgment against it. In essence, this petition alleged that defendant had no notice or knowledge of the entry of the final judgment against it until November 17, which was nearly four months thereafter; that the failure to file the amended answers to the interrogatories was "inadvertent" and "due to the press of business of the garnishee-defendant's counsel, who is a sole practitioner, and who was engaged in considerable matters in Cook County during this period; "and that defendant had a meritorious defense to plaintiff's garnishment claim in that it "did not have at the time they were served with Notice of Garnishment, nor have they had since that date or at the present time, any funds belonging to the "judgment debtor. In answering the petition, the plaintiff did not deny defendant's lack of knowledge of the final judgment until nearly four months thereafter, nor was it denied that defendant held no funds subject to garnishment.

It is well settled that a determination under Section 72 invokes the equitable powers of the court, as justice and fairness require. Elfman v. Evanston Bus Co., 27 Ill. 2d 609, 613, 615 (1963). However, this section is not intended to relieve a party "from the consequences of his own mistake or negligence" (Ulrich v. Glyptis, 79 Ill. App. 2d 447, 454 (1967), and relief thereunder requires a showing of both a reasonable excuse for failure to defend within the appropriate time and the statement of ultimate facts showing a meritorious defense. See, e. g., Stoller v. Holdren, 47 Ill. App. 2d 81, 82-83 (1964).

We conclude, although not without some misgiving with reference to the overall diligence of the defendant's counsel, that the defendant has met the burden of Section 72, and that it would be in the interest of justice and equity to affirm the vacation of the final judgment entered below.

It must be noted at the outset that the defendant did not know of the entry of the final judgment of August 23 until well after thirty days had expired. This fact is alleged in the petition under Section 72 and is not denied in the answer thereto. Moreover, the defendant was under no duty to anticipate that the judgment would be

entered on that day. The prior court order of August 3 gave defendant "to the 23rd day of August" to file its amended answer, which we construe as doing no more than giving defendant until August 23 to file such pleading. The order did not set any hearing for August 23, nor did it specify that anything would transpire in court on that date.

We do not question plaintiff's good faith in appearing in court on August 23 and procuring the final judgment order without sending additional notice to the defendant. Plaintiff's attorney did not see the order granting defendant additional time to answer, and he very likely believed that the order also continued the hearing on his motion for a final judgment. The fact remains that the order did not continue the hearing on his motion and defendant's ignorance of a final judgment being entered that day was justified.

While we are well aware of the defendant's failure to respond to the summonses served upon it, and its failure to file an amended answer even after achieving a continuance to do so, an analysis of the facts in light of Section 72 requires special focus on the defendant's conduct in pursuing its rights after entry of the judgment in question when that judgment was entered without defendant's knowledge. Thus, in Skivington v. Lehman, 36 Ill. App. 2d 479 (1962), the defendant did not appear personally or by his attorney when the case was called for trial. Plaintiffs thereupon waived their jury demand, the cause was heard ex parte, and judgment was entered against the defendant. After holding that the jury could not be waived without notice to the defendant, the Court stated the rule as follows (36 Ill. App. 2d at 484):

> "Since we have determined that defendant was entitled to notice of the jury waiver, the test is not, as argued by plaintiffs, whether defendant was negligent in following her case through the court or in failing to secure new counsel of record after the withdrawal of her first attorneys, but, rather, whether she was diligent in presenting

> her petition under Section 72. It is uncontradicted that defendant's first knowledge of the ex parte judgment of May 25, 1960 came with the service of execution on July 27, 1960. Within two weeks thereafter she served notice, and presented her petition to the court on August 15, 1960. This action was indeed prompt, and fully meets the diligence requirement of Section 72." (Emphasis added.)

The similarity between the Skivington case and the instant case is striking. In both, the defendants were arguably careless in following their cases and presenting their defenses; in each, however, an order was entered which the defendant had no duty to anticipate; and in each, the defendant proceeded under Section 72 promptly upon learning of the adverse judgment.

Inasmuch as due diligence, like reasonable care, is a relative standard of conduct, a different case might have been presented had the plaintiff given notice of the final judgment order in time to permit the defendant to act within thirty days. Such was the view expressed in the recent decision of Gary Acceptance Corp. v. Napilillo, Gen. No. M 51422, ___ Ill. App.2d ___, 230 N.E.2d 73 (1967), where the court quoted from Jansma Transport, Inc. v. Torino Baking Co., 27 Ill. App. 2d 347, 354-355 (1960), as follows:

> "While no duty is imposed upon a party or counsel to sue out an execution promptly in order to inform a defendant of a default within the thirty-day period, yet failure to do so is a circumstance which casts a cloud upon the entire proceeding. Ellman v. DeRuiter, supra. On a petition to vacate, the court may properly take it into account in appraising the worth of the defense to the petition."

In addition to satisfying the duty of diligence as required by Section 72, the defendant's petition sufficiently set forth a meritorious defense. As previously noted, the petition alleged that defendant held no funds belonging to the judgment debtor, and plaintiff's response to the petition did not deny this allegation. Whether a hearing on the merits would bear out the allegation is immaterial on a determination under Section 72. The petition showed "ultimate facts showing a meritorious defense", which is

all that is required. Stoller v. Holdren, supra, at page 83.

Subsequent to the oral arguments herein, plaintiff moved to amend the record by adding the call sheets of the court below for August 3 and August 23, 1966. Defendant objected to the amendment, and we agreed to take the motion with the case. The call sheets in question consist of a list of case names and numbers, followed by certain pencil notations. These sheets are not a part of the court record, and the certification of the trial court clerk characterizes them as "the Clerk's notations on his work-sheet while in the Court Room." That a "Clerk's notation" might indicate the setting of a matter for a certain date has no probative value, particularly where no court order to that effect had been entered. Plaintiff's supplementary motion is, therefore, denied.

AFFIRMED.

Davis, P.J. and Abrahamson, J. - Concur

89 I.A.2 480

NO. 67-55

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

IN THE MATTER OF: THE INCORPORATION OF THE VILLAGE OF CAPITOL HEIGHTS,	)	
Petitioners-Appellants,	)	Appeal from the Circuit Court of Winnebago County
vs.	)	
CITY OF ROCKFORD,	)	
Objector-Appellee.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This is an appeal from the Circuit Court of Winnebago County, wherein the trial court dismissed the petition requesting the Village of Capitol Heights be incorporated. On October 28, 1966, a petition was filed seeking incorporation as a village of certain contiguous territory not exceeding two square miles, not already incorporated in the limits of an existing municipality and with in excess of 400 inhabitants living in dwellings other than mobile. The petition was signed by the requisite number of parties. At the time of filing this petition, the area did not lie within one mile of the boundary line of any existing municipality. The court immediately entered an order finding that the petition met the requirements of the statutes and set a referendum election to be held on November 19, 1966, to determine whether a majority of the some 794 residents of the area wished to incorporate. On November 7, 1966, the City of Rockford enacted an ordinance annexing certain territory contiguous to it which extended its municipal limits to

within less than 1 mile of the proposed village. On November 15, 1966, the City filed its objections in this proceeding and stated it would not give its consent to the incorporation. The court below, after hearing, dismissed the petition for incorporation.

Petitioners-Appellants contend that the area sought to be incorporated as the Village of Capitol Heights is a "village in fact"; that the ordinance of annexation by Rockford was invalid; and that if the ordinance of annexation was valid, Rockford could not block the incorporation of the proposed village by annexing territory within one mile after the petition for incorporation had been filed.

For the reasons hereinafter set forth, we do not deem it necessary to determine whether the area comprising Capitol Heights is a "village in fact". With regard to the validity of the ordinance of annexation, while the description of the land being annexed described a part of it as being "180 in width" without stating that it was 180 feet, the plat attached to said ordinance clearly shows the width of the annexed land and we will not invalidate the ordinance for that reason. Whether or not the City gave notice as required by statute to the Fire District in which the annexed land was located is not a question which may be collaterally attacked by these petitioners.

We believe the crux of the case to be whether or not the filing of the petition would prevent the City from subsequently annexing the territory which extended its limits to within less than 1 mile of the proposed village. Petitioners-Appellants rely on the decisions in the cases of The People v. Morrow, 181 Ill. 315, and People v. Village of Green Oaks, 55 Ill. App. 2d 51. In the Morrow case, a petition

was filed to incorporate the Village of North Chicago. Prior to the election to pass on the question of incorporation, the City of Waukegan annexed the exact same territory which was the subject of the petition for incorporation. The court held that once having started the process of organization of a given territory into a village, it could not be defeated by some of the residents petitioning for annexation and, in fact, annexing the territory into the City of Waukegan. In the case before us the City of Rockford has not annexed any of the territory sought to be incorporated as the Village of Capitol Heights. We do not believe the mere filing of a petition to incorporate a certain area can stop Rockford from annexing other land contiguous to it and not a part of the area sought to be incorporated.

In the case of Green Oaks, after Green Oaks had been properly and validly incorporated, Green Oaks and Libertyville both attempted to annex the same area. The Village of Libertyville had first filed its petition for annexation and three days later Green Oaks filed its petition to annex the same area. The County Court found that the petition of Libertyville was invalid and ineffectual and the petition of Green Oaks was valid. Libertyville then refiled a second petition. This Court held that at the time Libertyville passed its second annexation ordinance and filed its valid petition, Green Oaks already had pending a petition on file and that until that petition was disposed of Libertyville had no power to effect annexation of the territory that was the subject of the Green Oaks petition. Again, in that case the land area affected was identical and, therefore, dis-

tinguishable from the situation before us.

In Western Nat. Bank of Cicero v. Vil. of Kildeer, 19 Ill. 2d 342, 347, the court held that the statute covering the incorporation provides the time when the incorporation is effective and that that time is when the vote is canvassed and determined to be for the incorporation under the general law. We concluded that a village would not become a legal entity until the County Court declared its existence based on the official canvass of the votes cast in the special election on the question of incorporation. The mere filing of a petition to incorporate by the residents of one area should not deprive a municipality from exercising its statutory authority to annex another parcel of land. At the time of the hearing in the court below and prior to completion of the incorporation proceedings the municipal limits of Rockford were within one mile of the area sought to be incorporated and, therefore, permission of Rockford was by statute required. It is the state of events that exists at the time of the hearing which controls, not the state of events at the time of filing the petition. LaSalle Nat. Bank v. Village of Willowbrook, 40 Ill. App. 2d 359, 362; In Re Petition of Cox, 32 Ill. App. 2d 142.

We are of the opinion that the court below properly dismissed the petition for incorporation, finding that the City of Rockford had in fact annexed the territory within less than one mile of the proposed area to be incorporated and refused to consent to such incorporation.

JUDGMENT AFFIRMED.

DAVIS, P. J. and MORAN, J. concur.